Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1993

RAY BELL, Individual,

Petitioner,

v.

CONTINENTAL BANK, N.A., formerly known as Continental Illinois National Bank and Trust Company of Chicago,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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January 13, 1993

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QUESTIONS PRESENTED

I. Did the Court of Appeals violate the Rule of Decision Act by failing to require the District Court to apply the full scope of its equitable jurisdiction as required by the Oklahoma Supreme Court?

II. Did the Court of Appeals violate Petitioner's right to trial by jury in substituting its view of the sufficiency of the evidence for that of the jury contrary to Oklahoma law and prior decisions of this Court?

PARTIES

Petitioner:	Ray Bell, an individual referred to as (Bell).
Respondent:	Continental Bank, N.A., formerly known as Continental Illinois National Bank and Trust Company of Chicago referred to as (Bank).
The Act:	Oklahoma Securities Act, Title 71, O.S. § 401 et seq.
Decision Act:	The Rule of Decision Act, Title 28 U.S.C. § 1652

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Order, Court of Appeals, Tenth Circuit, Nos. 91-6260 and 91-6278, before McKay, Chief Judge, Logan, Seymour, Moore, Anderson, Tacha, Boldock, Brorby, Ebel, and Kelly, Circuit Judges, entered 15 Oct., 1993 (Pet. App.) at 5a

NOTE: All Circuit Court decisions are unreported, despite the fact that the Circuit Court reversed the largest Oklahoma federal court securities fraud jury verdict to date, to our astonishment.

JURISDICTION

The Court of Appeals denied a timely Petition for Rehearing on October 15, 1993. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Title 28 U.S.C. § 1652
(Rule of Decision Act)

Title 71 Okla.Stat. § 408(a)(2)
(Oklahoma Securities Act)

As concisely stated by the Court of Appeals in "Section IV. Damages" of its Order and Judgment. *See* (Pet.App.) 2a p.17

> "IV. Damages
>
> Because the claims for common law and securities fraud have been eliminated, we remand this case for a new trial on the single issue of the appropriate damages to be awarded on the surviving non-registration claim as governed by 71 Okla. Stat., § 408(a)(2). *Under § 408, Bell is entitled to recover the purchase price actually paid for the An-Son securities as well as interest at 10% a year from the date of payment. Costs and reasonable attorney's fees, less the amount of any income received on the security, upon tender of the security, are recoverable.* In sum, we REVERSE the denial of CINB's motions for directed verdict and j.n.o.v on the claims of common law and securities fraud and REMAND the action for a redetermination of damages." (emphasis added).

ARTICLES

Lender Liability Law Report, Vol. 4 No. 1 dated July 1990, edited by Helen Davis Chaltman, Esq. (Pet. App.) at 6a

26 Am.Jur.2d *Equity*, § 249

STATEMENT OF THE CASE

On April 4, 1988, after four years of discovery, millions of dollars in attorney fees, countless dollars of expenses, the jury returned a damage award in favor of the Petitioner (Bell) for $51,000,000.00 against the Respondent (Bank). The District Court adjusted the award to $51,604,074.30. (Pet.App.) 1a.

The jury determined special interrogatories to the effect that the Respondent (Bank) failed to disclose certain material information, that the Bank violated Rule 10(b)-5 of the Securities Act of 1934, Section 12(2) of the Securities Act of 1933 and Section 408(a)(1) of the Oklahoma Securities Act (the "Act"). The jury further found that the Bank was a substantial factor in the sale of said securities and also that the Bank was a controlling person. The jury did not respond to two of the special interrogatories and Bell waived both of these interrogatories. The specific interrogatories were:

> *"A. PLAINTIFF'S FRAUD CLAIMS*
>
> 1. Do you find by clear and convincing evidence that the Atex Group[1] was defrauded by Continental when the Atex Group purchased

[1] Petitioner (Bell) and his interests were referred to as the Atex Group for simplification.

An-Son's interest of ORC as a result of Continental's alleged misrepresentations of ORC's value? *Waived by plaintiffs' counsel after jury unable to answer unanimously.*

2. Do you find by clear and convincing evidence that the Atex group was defrauded by Continental when the Atex group purchased Anson's interest of ORC as a result of Continental's failure to disclose material information regarding the value of ORC to the Atex group? *Yes.*

3. Do you find by clear and convincing evidence that the Atex Group was defrauded by Continental when the Atex mortgaged property and pledged stock on June 18, 1984 as a result of Continental's alleged promise to provide ten year refinancing? *Waived by plaintiffs' counsel after jury unable to answer unanimously.*

B. PLAINTIFF'S SECURITIES CLAIMS

1. Do you find by a preponderance of the evidence that Continental Illinois Bank violated Rule 10(b)-5 of the Securities Act of 1934? *Yes.*

2. Do you find by a preponderance of the evidence that Continental Illinois Bank violated Section 12(2) of the Securities Act of 1933? *Yes.*

3. Do you find by a preponderance of the evidence that Continental Illinois Bank violated Section 408(a)(1) of the Oklahoma Securities Act? *Yes.*

4. Do you find by a preponderance of the evidence that Continental Illinois Bank was a 'substantial factor' in the sale of the Anson securities? *Yes.*

> 5. Do you find by a preponderance of the evidence that Continental Illinois Bank was a 'controlling person' with respect to Anson Transportation Company and Anson Refining Company during the April 1983 sale of ORC? *Yes."*

On the 2nd day of April, 1990, the Court of Appeals reversed the jury as to the fraud causes of action, but upheld the jury finding that the Respondent (Bank) violated the Oklahoma Securities Act and remanded to the District Court for damages. (Pet.App.) 2a.

Upon remand, the District Court did something very unusual. Three days before trial, it amended a statutory formula for the determination of damages, in fact altering the damage section of the Oklahoma Securities Act, Title 71 O.S. § 408(a)(2), proceeded to hear the matter, made certain fact determinations, and found no damages. The district court forgot to place the Petitioner (Bell) in the position he was in before the transaction; "status quo ante," as clearly required by Oklahoma law.

Bell appealed the District Court's finding of "no damages." On September 14, 1993, the Court of Appeals upheld the lower court's finding, despite the fact that the district court ignored the formula for damages set forth in the Court of Appeals 1990 decision. *See* (Pet.App.) 2a p.17 or p.6 *supra*, and the Oklahoma law requiring "status quo ante."

It is this decision by the Court of Appeals from which Bell seeks redress.

Bell does not contest the discretionary or equity powers of the Courts, but in this instance, the Courts

abused their discretion in not exercising the Court's full scope of equity to place the Petitioner in the same position he was in prior to the transaction.

Title 71 O.S. § 408 legislates that damages for violation of the Oklahoma Securities Act are summarized as follows:

> "A. Consideration paid for the securities plus 10% interest from date of transaction (April 12, 1983);
>
> B. Less any income derived from the securities; and,
>
> C. Plus attorney fees and costs." (Date of transaction added).

Before hearing any evidence, the District Court amended the Oklahoma law. The District Court said the rule of damages would be:

> "A. Consideration paid for the securities plus 10% interest from the date of transaction (April 12, 1983);
>
> B. ***Less the value of the collateral at the date of transaction;*** (added by District Court)
>
> C. Less any income received from the securities; and,
>
> D. Plus attorney fees and costs." (Date of transaction added). (Emphasis added).

The alteration not only changes the Oklahoma Securities Act § 408 in this instance, but defies analysis.[2]

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[2] Under the District Court's change, "status quo ante" can almost never be satisfied if equity is not applied over and above

In the instant case, the Respondent (Bank) sold the guaranties to the F.D.I.C. in a bank bailout. In 1984, the Respondent (Bank) was about to fail. The F.D.I.C. provided a little less than $4 billion dollars in money or credit to the bank and the bank delivered to the F.D.I.C. loans, assets, and guaranties in exchange. *The F.D.I.C. specifically gave the Respondent (Bank) $41,600,000.00 for the Petitioner's (Bell's) guaranties.*

The F.D.I.C. promptly sued the Petitioner (Bell) on the guaranties plus interest and costs for $51,604,074.30. The F.D.I.C. received a summary judgment against Petitioner (Bell). As this Court recognizes, the defenses against the F.D.I.C. are meager. (Title 28 U.S.C. § 1823E).

The only recourse for Bell was to proceed against the Respondent (Bank).

The following reviews the circumstances at that point in time.

The F.D.I.C. in 1984 paid the Respondent (Bank) $41,600,000.00 for the Petitioner's (Bell's) guaranties as part of a very large bank bailout.

The F.D.I.C. sued and received a summary judgment against the Petitioner (Bell) for $51,604,074.00, plus interest and costs.

Petitioner (Bell) assigned his jury damage award to the F.D.I.C.

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a simple mathematical determination. This the District Court failed to do, and the Circuit Court failed to correct although required by the law of Oklahoma.

The F.D.I.C. executed on the judgment and rendered Petitioner (Bell) insolvent by liquidating his business interests and putting approximately 1,500 employees out of work.

Petitioner (Bell) tendered rescission but the Respondent (Bank) could not return the guaranties for the securities because it had sold the guaranties to the F.D.I.C. for $41,600,000.00, thus Bell could not have simple rescission.

The law in Oklahoma is straightforward. If one cannot have simple rescission, to-wit: an undoing of the transaction by returning the securities for the guaranties, one must have rescissionary damages, *and the Petitioner must be returned to his original condition, "status quo ante."* This was never accomplished by the United States District Court or corrected by the Court of Appeals.

Thus, only rescissionary damages remain in order to return the Petitioner to "status quo ante" under the Oklahoma Securities Act. (Title 71 O.S. § 408(a)(2)) and *Day v. S.W. Mineral Energy, Inc.*, 617 P.2d 1334 (Okla. 1980).

This litigation began in 1984. It is now 1994, and Bell has not as yet been returned to "status quo ante" notwithstanding the simple mandate of the Oklahoma Securities Act and the leading Oklahoma Supreme Court case: *State ex rel Day v. S.W. Mineral Energy, Inc.*, 617 P.2d 1334 (Okla. 1980) citing *Porter v. Warner Holding Company*, 328 U.S. 395, 66 S.Ct. 1086, 1089 (1946).

After nine years of litigation, Bell is in this absurd position:

a. The Respondent (Bank) who violated the Oklahoma Securities Act as determined by the jury in the

District Court and upheld by the Circuit Court, has been paid in full by the F.D.I.C. ($41,600,000.00 in 1984).

b. The Petitioner (Bell), who properly rescinded the transaction is insolvent, his business interests liquidated, and Bell still is seeking enforcement of his rights for "status quo ante" rescissionary damages.

c. The District Court and the Circuit Court have ignored or discarded the Rule of Decision Act as it applies to the Oklahoma Securities Act and the decision of the Oklahoma Supreme Court in *State ex rel Day, supra.*

CORE ARGUMENT – SIMPLY STATED

1. The Rule of Decision Act requires Oklahoma law to be followed and satisfied when an Oklahoma question is being adjudicated.

2. Oklahoma law in this case is the Oklahoma Securities Act and Oklahoma Supreme Court decisions construing same.

3. The Oklahoma Securities Act states that if it is violated, one is entitled to rescission.

4. Petitioner (Bell) properly asked for rescission by tendering securities back to Respondent (Bank) when Bank violated the Oklahoma Securities Act.

5. Both the United States District Court and the United States Court of Appeals have upheld the jury determination that Bank violated the Oklahoma Securities Act.

6. Bell cannot get rescission because Bank cannot return guaranties, the consideration for the transfer as it sold same.

7. The Oklahoma Securities Act and the Oklahoma Supreme Court clearly require that if one cannot have rescission, then one is entitled to rescissionary damages which must put one back in one's position prior to the transaction "status quo ante," since the transaction was "void ab initio."

8. The Appeals Court violated the Oklahoma law by not reversing the District Court, and that failure to follow the Oklahoma law violated the Rule of Decision Act. This in turn, violated Petitioner's (Bell's) Fifth Amendment rights for due process.

I. THE 1993 APPELLATE JUDGMENT VIOLATES THE RULE OF DECISION ACT.

The Rule of Decision Act, 28 U.S.C. § 1652, requires a federal court to give a state's enactment the same meaning and effect as the highest court of that state. *Burns Mortgage Co. v. Fried*, 292 U.S. 487, 493-494, 54 S.Ct. 813 (1934); *Morgan v. Equitable Life Assoc. Soc.*, 446 F.2d 929, 932 (10th Cir. 1971); *Cherry v. Steiner*, 543 F.Supp. 1270 (D.C.Ariz. 1982), *affirmed* (CA 9th Ariz.), 716 F.2d 687, *cert. denied* 466 U.S. 931, 104 S.Ct. 1719.

In the instant 1993 Court of Appeals Judgment, Pet.App. 4a, the panel stated:

> . . . although a trial court is clearly authorized to grant equitable relief under the Oklahoma Securities Act, nothing in the Act or in Oklahoma

> case law *requires* a trial court to exercise its equitable powers, . . .

This is incorrect if the non-exercise of its equitable powers does not return Bell to "status quo ante."

In *State ex rel. Day v. S.W. Mineral Energy, Inc.*, 617 P.2d 1334 (Okla. 1980), the Oklahoma Supreme Court upheld the district court's power to grant equitable and injunctive relief under the Act, notwithstanding the absence of a specific statutory provision therefor. To support its decision, the Oklahoma Supreme Court invoked the United States Supreme Court's ruling in *Porter v. Warner Holding Company*, 328 U.S. 395, 66 S.Ct. 1086, 1089 (1946):

> Moreover, the comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute, in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction *is to be recognized and applied.*

State ex rel. Day v. S.W. Southwest Mineral Energy, 617 P.2d at 1336 (emphasis added).

The Act contains no explicit restriction upon a district court's equity jurisdiction, nor may any such restriction be fairly inferred. *See* 71 Okla. Stat. § 408(1) (providing that the rights and remedies under the Act are in addition to other rights or remedies existing in law or equity). Petitioner (Bell) has consistently invoked his right to *rescind* this unregistered securities transaction. Having properly invoked the district court's unrestricted equity jurisdiction, Petitioner respectfully urges that

Oklahoma law does indeed *require* the complete utilization of equity remedies, to accomplish "status quo ante."

The substance of the panel's 1993 Appeal Judgment is that the district court's damage formula was a proper exercise of the district court's discretion. Petitioner has always argued that the district court has broad discretion to craft a rescissionary remedy. However, a remedy is only a means to an end; and with respect to the "end" of rescission, Petitioner submits that the district court had no discretion. *Restoration of the status quo ante is the goal of rescission* and the benchmark against which the propriety of any rescissionary remedy must be measured. By affording the *status quo ante* no role in its formula, the district court ignored Oklahoma law as interpreted by the Oklahoma Supreme Court in violation of the Rule of Decision Act. By affirming the district court, the Circuit Court committed the same violation. Petitioner urges that this refusal to apply state law violates his right to substantive due process. *See, Erie Ry. Co., v. Tompkins,* 304 U.S. 64, 71, 78, 58 S.Ct. 817, 819, 822 (1938). (Emphasis added).

The Oklahoma Supreme Court has stated that the object of a rescission under the Act is restoration of the status quo ante. Mayfield v. H.B. Oil & Gas, 745 P.2d 732, 736 (Okla. 1987) (adopting *Western Federal Corp. v. Davis,* 553 F.Supp. 818, 820-21 (D.Ariz. 1982). (Emphasis added).

Further, the Oklahoma Supreme Court stated in *Hooper v. Commercial Lumber Co.,* 341 P.2d 596, 598 (Okla. 1959),

> On rescission of a contract it is *void ab initio*, and the rights of the parties in reference to the subject matter of it are the same as if no contract had been made. *Rescission places the parties in the position they would have occupied if the contract had never existed.* (Emphasis added).

The record is abundantly clear that at no time did the district court make *any* attempt to determine if the *result* of its purely mechanical calculation was consistent with the *purpose* of the retrial: the determination of the relief by which *rescinding* securities purchaser, as Bell is herein, is restored to his prior position.

The consideration given by Petitioner (Bell) for the unregistered securities included the undertaking of the obligation to pay all debts to its lenders. As of the date of the retrial, that obligation, *after* application of the actual proceeds of Bell's guaranties, had ripened into a judgment liability of $64,570,952.66 in favor of F.D.I.C. Rescission mandates the cancellation *ab initio* of the aggrieved Petitioner's (Bell's) obligation. It was not Petitioner (Bell) who prevented legal cancellation of their guaranty obligations. As Petitioner (Bell) repeatedly argued, and as Respondent (Bank) has never denied, legal cancellation is precisely what would have occurred if Respondent (Bank) had not elected to sell guaranties to the F.D.I.C.

By a single voluntary act, Respondent (Bank) made itself whole by selling Bell's guaranties to the F.D.I.C. and deprived Petitioner (Bell) of the ability to enforce a legal cancellation of his guaranty obligation. *See F.D.I.C. v. Bell*, 892 F.2d 64 (10th Cir. 1989). The district court's judgment, which the circuit panel has affirmed, leaves Petitioner (Bell) *much* worse off than he was before the unlawful

securities sale, while leaving Respondent (Bank) *much* better off than it would have been had it not transferred away the guaranty obligation. Had Respondent (Bank) not voluntarily sold off its guaranties and related assets, Respondent (Bank) would have been left holding the remainder of the unpaid debt and the guaranties of Petitioner (Bell) would have been canceled. However, the Oklahoma Supreme Court endorses the maxim that equity considers done that which ought to be done. *Clark v. Armstrong & Murphy*, 72 P.2d 362, 366 (Okla. 1937). That Respondent voluntarily sold Petitioner's (Bell's) guaranties to F.D.I.C. (as against which the guaranties could not be rescinded as a matter of *federal* law) should not be permitted to deprive Petitioner (Bell) of his rights, as a matter of *Oklahoma* law, to rescission of these guaranties as against Respondent (Bank), or the equitable equivalent, rescissionary damages.

The intervening sale of the guaranty obligations by Respondent (Bank) affected only the *means* to do equity which are within the district court's discretion, but not the district court's duty to accomplish the *end* of rescission – equity relief of the parties victimized by an illegal transaction nurtured by Respondent (Bank).

Under Oklahoma law, the loss, if any, must inure to the violator of the Oklahoma Securities Act, the Respondent (Bank).

II. THE 1990 APPELLATE COURT JUDGMENT VIOLATES THE RIGHT OF TRIAL BY JURY IN SUBSTITUTING ITS VIEW OF THE SUFFICIENCY OF THE EVIDENCE FOR THAT OF THE JURY.

The jury found common law fraud, along with § 10(b)5 of the Securities Act of 1934, and § 12(2) of the Securities Act of 1933, fraud violations and returned a jury verdict of $51,600,000.00.

Among other things, the common law fraud was based on less than full disclosure.

The Court of Appeals in its 1990 decision reversed all fraud claims stating that there is no duty to inform or disclose in Oklahoma, but upheld the Oklahoma Securities Act violation.

The Court of Appeals is in error. Even if there is no duty to disclose, Oklahoma law requires full disclosure where "affirmative statements" are made.

On page 203, 204 Volume II Trial Transcript (*see* Pet. App. 7a) in a private discussion between Derek Morrison, a vice president of the Respondent (Bank) and Petitioner (Bell) prior to the purchase of the securities, Bell was told that the Bank's engineers had "market" evaluated the properties (refineries) at $47 million.

Further, the Bank told Bell that Bell would be picking up a net equity value of $10 million when he purchased the securities:

[p. 203] And we went into the office of the president, Derek and myself. We sat down on the couch and then again, Derek was – or Derek at that time was talking to me about buying the refinery. And he told me that they'd

had an engineering, a fairly recent engineering report. Told me the value of the refineries, told me that it would be advantageous for us to acquire it. He said that they liked our on-hands approach, the way we had operated Tonkawa. He liked the way that we did business and he would like to see us work out something to acquire Mr. Anderson's interest.

Q And this was a meeting between you and Mr. Morrison, Derek Morrison?

A Yes, sir.

Q Before the manager's meeting began?

A Yes, sir.

Q And you and he were by yourselves?

A That's my recollection. There might have been – I think there was someone else in the room but I believe Derek wanted to talk to me alone. So –

Q And what did – what was the discussion concerning the engineering department of the Continental Bank?

A He told me that the engineers had evaluated the Cyril Refinery at 32 million dollars and then he also told me that they felt that the value of the Thomas plant was 15 million, total of 47 million.

[p. 204] Q Now, was the market value of the two of them together?

A Yes, sir.

Q Would be a 32 million for Cyril and 15 million for Thomas?

A Yes, sir.

Q And at that time do you remember approximately what the debt on that refinery or those refineries and ORC was, the capital debt?

A My recollection was that it was about 27 million, I think. I believe that was right, or maybe – that's my recollection of the total indebtedness, maybe, with adjustments, would be 27 million. Or that might have been how much additional debt that would be. I can't be sure on that. But, anyway, what he said was that I would be getting – for the two-thirds, I would be getting a net value of 10 million dollars in net worth.

When the Bank "spoke," they were required to fully disclose when affirmative statements are made.

It is settled in Oklahoma that the concealment of material facts which one is bound to disclose under the circumstances may constitute fraud. In *Varn v. Maloney*, 516 P.2d 1328, 1332 (Okl. 1973), the court quoted with approval the case of *Deardorf v. Rosenbush*, 201 Okl. 420, 206 P.2d 996 (Okl. 1949):

> "A duty to speak may arise from partial disclosure, the speaker under a duty to say nothing or tell the whole truth. One conveying a false impression by the disclosure of some facts and the concealment of others is guilty of fraud, even though his statement is true as far as it goes, since such concealment is in effect a false representation that that which is disclosed is the whole truth."

The jury determined that the bank did not tell the whole truth to Bell.

The Circuit reversed the jury with its position that it owed no duty of disclosure. The Circuit Court did not rely on the entire Oklahoma law.

The Tenth Circuit Court had ruled that a duty to disclose financial information known to a bank but not known to a potential buyer can exist. In *Spiva v. Bryant*, No. 86-2317 (10th Cir. 1988) the Court stated:

> "Significantly, these claims are predicated not upon Ledbetter's affirmative misrepresentations, but upon an omission, a failure to disclose material information, that applies not only to Ledbetter personally but also directly to the bank which, as the evidence established, owed the duty to disclose to plaintiff, possess the pertinent information, and certainly had means quite apart from Ledbetter to communicate that information to plaintiff."

The facts in *Spiva* are similar to those in the instant case.

What the Bank failed to disclose was that a week or so before the above disclosure as to market value of $47 million, there was an internal written memorandum issued by the Bank's engineering department that the market value of those same properties was $22.3 million and that the Bank's loan to ORC was classified as substandard.

* * *

[p. 229] Q Mr. Bell, were you ever told that the Continental Bank evaluated the ORC refineries prior to the sale to you, I believe, in April of 1983 that they had internally, their engineering department had evaluated

the refineries having a market value of 22.3 million dollars? Were you ever told [p. 230] that?

A No, sir.

Q Which, in effect, if ORC at that time had a capital debt of 32 million dollars would have made ORC insolvent? Were you ever told any of this?

A No, sir.

Q Were you told, were you ever told, that Continental had an internal engineering report evaluating the refineries at 22.3 million dollars prior to your purchase of the An-Son two-thirds?

A No, sir, it was 45 million.

Q I think you testified 47, but I'm not arguing with you.

A Yes, sir.

Q It was 32 and 15 or something.

A All right. Sorry.

Q Mr. Bell, if you had that information, would you ever have recommended to your associates and would you ever have purchased An-Son's two-thirds?

A No, sir.

Q Number two, have you ever been informed by anybody at Continental prior to your purchase in April of '83 of the An-Son two-thirds of ORC, that the ORC loans to ORC in favor of Continental had been classified by the Continental Bank as substandard, poor, and doubtful?

[p. 231] A No, sir, I would have been very much surprised because I thought they were performing loans.

Q If you had known prior to this purchase in April of '83 that the bank, the Continental Bank, had downgraded the ORC credit to poor or doubtful recovery, would you have ever purchased –

A No, sir.

Q – the An-Son two-thirds of ORC?

A No, sir.

Q Were you ever told by any of the bankers at Continental that the ORC, the Oklahoma Refining Company, revolving line of credit had to a large degree ceased to revolve since Carl Anderson had used this short term credit to install fixed assets leaving ORC at least 11 million dollars undercapitalized?

A No, sir.

Q Would you have purchased An-Son's two-thirds of ORC had you been informed of that?

A No, sir.

Q Were you ever informed by anybody at Continental that the ORC term debt of 14 millions of dollars could not be repaid by ORC from its operations?

A No, sir.

* * *

The Court of Appeals' reversal of the trial court's jury verdict is contrary to Oklahoma law, violating *Erie Ry. Co. v. Tompkins*, 304 U.S. 64, 71, 78, 58 S.Ct. 817, 819, 822 (1938) and depriving Bell of his rights to trial by jury.

LAW IN SUPPORT OF PROPOSITION II

In reviewing the sufficiency of the evidence to support the jury's verdict, the Court of Appeals was bound to view the evidence in the light most favorable to Petitioner. *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690, 696 (1962). This it failed to do. As in *Continental*, the Court of Appeals in this case compartmentalized the evidence supportive of the jury verdict, ignored critical evidence favorable to the verdict, and failed to give Petitioner the benefit of all inferences which the evidence fairly supports, even if contrary inferences might have been drawn. *Id.* at 696-99.

In so doing, the Court of Appeals violated Petitioner's constitutional right to trial by jury. *See, Tenant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29, 35, 64 S.Ct. 409 (1944). Because the Court of Appeals substituted its view of the sufficiency of the evidence for that of the jury, and because this Court will act to safeguard the right to trial by jury in an appropriate case, 321 U.S. at 35-36, this Court should grant a writ of certiorari and reinstate the jury's verdict. *See, Dick v. N.Y. Life Ins. Co.*, 359 U.S. 437 (1959); *Gibson v. Phillips Petroleum Co.*, 352 U.S. 874 (1956); *Swafford v. Atlantic Coast Line Railroad Co.*, 350 U.S. 807 (1955); *Tenant v. Peoria & Pekin Union Railway Co.*, 321 U.S. 29, 64 S.Ct. 409 (1944).

III. REASONS FOR GRANTING WRIT

The District Court violated Petitioner Bell's Fifth Amendment right to substantive due process because it completely ignored the Federal Rule of Decision Act, 28

U.S.C. § 1652 which required returning Mr. Bell to his position prior to the securities transaction as mandated by the Oklahoma Supreme Court.

The Circuit Court violated Mr. Bell's Fifth Amendment rights to substantive due process because it violated the Rule of Decision Act and the clear meaning of the Oklahoma Securities Act and the Oklahoma Supreme Court decisions requiring "status quo ante" as if the securities transaction never occurred, "void ab initio."

The Circuit Court violated Bell's Seventh Amendment right to trial by jury by ignoring evidence favorable and supportive of the jury verdict and not delivering to Bell the benefit of all inferences which the evidence fairly supports. This Court should grant a Writ of Certiorari and reinstate the jury's verdict.

This case has been litigated since 1984. The wrongdoer Respondent (Bank) has been paid in full by the F.D.I.C.

Mr. Bell still is waiting for his "status quo ante" and equity, as directed by the Oklahoma Supreme Court in *State ex rel Day v. S.W. Mineral Energy, Inc.*, 617 P.2d 1334 (Okla. 1980); *Mayfield v. H.B. Oil and Gas*, 745 P.2d 732 (Okla. 1987), adopting *Western Federal Corp. v. Davis*, 553 F.Supp. 818, 820-21 (D.Ariz. 1982) and the Oklahoma Supreme Court in *Hooper v. Commercial Lumber Co.*, 341 P.2d 596, 598 (Okla. 1959), stating that:

> "On rescission of a contract it is *void ab initio*, and the rights of the parties in reference to the subject matter of it are the same as if no contract had been made. *Rescission places the parties in the position they would have occupied if the contract had never existed.*" (Emphasis added).

The Supreme Court is the ultimate supervisor of the federal judiciary. This Court must instruct the federal courts that in applying their equity jurisdiction to a case substantively governed by state law, they *must* exercise their full powers of equity if required to do so under state law so that the outcome in federal court is no different than it would have been in state court.

The Tenth Circuit Court of Appeals has refused to follow controlling Oklahoma Supreme Court decisions requiring the court to apply the full scope of its equitable jurisdiction as required by *Day* in order to accomplish the remedy required by Oklahoma statutory law and Oklahoma Supreme Court law.

CONCLUSION

The people of the United States, whose interests are represented by the F.D.I.C. in this matter, possess a judgment against Mr. Bell that cannot be satisfied until the District Court exercises its full equity power as required by Oklahoma law, and awards such damages as to place Petitioner (Bell) in his prior position.

Equity in this case thus far is comparable to Chamberlain's "Peace in our Time" unless the Supreme Court acts, all will be lost and the Oklahoma law will remain violated.

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APPENDIX 1

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

CONTINENTAL BANK, N.A., formerly known as Continental Illinois National Bank and Trust Company of Chicago, Plaintiff-Appellee, and FEDERAL DEPOSIT INSURANCE CORPORATION, Receiver, Substituted for First National Bank & Trust Company of Oklahoma City, Oklahoma, Plaintiff, v. JAMES E. BURKE, Trustee for Atex Oil Company of Texas, now known as ATB Realty Company, and Atex Oil Company of New Mexico, now known as ATC Realty Company; ATEX REFINING COMPANY; and RAY BELL, Defendants-Appellants, and ATEX OIL COMPANY, ATEX STATIONS, INC., ANSON REFINING CO., ATEX PIPELINE CO., ANSON PIPELINE CO., OKLAHOMA PIPELINE CO., and ANDERSON-PRICHARD PIPE LINE CORPORATION, Defendants.	No. 91-6260 (W.D. Okla., No. CIV-84-2386-C)

CONTINENTAL BANK, N.A., formerly known as Continental Illinois National Bank and Trust Company of Chicago,

Plaintiff-Appellant,

and

FEDERAL DEPOSIT INSURANCE CORPORATION, Receiver, Substituted for First National Bank & Trust Company of Oklahoma City, Oklahoma,

Plaintiff,

v.

JAMES E. BURKE, Trustee for Atex Oil Company of Texas, now known as ATB Realty Company, and Atex Oil Company of New Mexico, now known as ATC Realty Company; ATEX REFINING COMPANY; and RAY BELL,

Defendants-Appellees,

and

ATEX OIL COMPANY, ATEX STATIONS, INC., ANSON REFINING CO., ATEX PIPELINE CO., ANSON PIPELINE CO., OKLAHOMA PIPELINE CO., and ANDERSON-PRICHARD PIPE LINE CORPORATION,

Defendants.

No. 91-6278
(W.D. Okla., No. CIV-84-2386-C)

ORDER AND JUDGMENT*

(Filed Sept. 14, 1993)

Before **EBEL, MCWILLIAMS,** and **BRORBY,** Circuit Judges.

The appellants appeal the district court's finding under the Oklahoma Securities Act that, although the appellees violated the Oklahoma nonregistration provision, the appellants are entitled to no monetary relief. The appellees cross-appeal the district court's finding that the appellants are entitled to attorneys' fees as prevailing parties under the Oklahoma Securities Act when the appellants were awarded no relief on their nonregistration claim. We affirm the district court's finding that the appellants are entitled to no monetary relief, and we dismiss the cross-appeal on the attorney's fee issue for lack of jurisdiction.

FACTS

1. THE PLAYERS

Appellant Ray Bell owned and operated numerous gasoline service stations in the southwest through various corporations in which he held a controlling interest. Bell and his family owned a 100 percent interest in

*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

appellant ATEX Oil Company of New Mexico ("ATEX N.M."),[1] which in turn owned 100 percent of the shares of appellant ATEX Oil Company of Texas ("ATEX Tx."),[2] which in turn owned 100 percent of the shares of appellant ATEX Refining Company (ATEX Rf.") (collectively, "the ATEX Group").

Carl Anderson, who is not a party to this appeal, produced crude oil. He too owned a series of interrelated companies, including An-Son Corporation, An-Son Transportation Company, An-Son Pipeline Company, and An-Son Refining Company (collectively, "An-Son"). None of the An-Son corporations are parties to this appeal.

In 1978, the ATEX Group formed a general partnership called Oklahoma Refining Company ("ORC") with An-Son and others.[3] An-Son and the ATEX Group eventually bought out the other partners' interests: after the buy out, the ATEX Group owned 34 percent of ORC, while An-Son owned 66 percent. At the time ORC was formed, ORC borrowed $20 million from First National Bank of Oklahoma City ("First National"), which it used to buy a refinery and fund operations. First National immediately sold an interest in the loan to appellee Continental Bank,

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[1] Although ATEX N.M. is now known as ATC Realty Company, we will refer to it by its former name.

[2] Although ATEX Tx. is now known as ATB Realty Company, we will refer to it by its former name.

[3] The designated entities named as the general partners in the partnership agreement were ATEX Rf. and An-Son Refining Company. For ease of reference, we will refer to the general partners in ORC as the ATEX Group and An-Son.

N.A.[4] The loan was secured by nearly all of ORC's assets – the oil refinery, all inventory, accounts receivable, equipment, and supplies. In addition, Anderson and An-Son Corporation guaranteed 66 percent of ORC's obligations to the banks, while Bell and ATEX N.M. guaranteed 34 percent. ORC subsequently increased its indebtedness to Continental and First National (collectively, "the Banks").

2. THE ORC BUY OUT

Between late 1982 and early 1983, the Anderson and An-Son guarantors, the Bell and ATEX guarantors, and the Banks discussed the possibility that Bell and the ATEX Group might buy out An-Son's interest in ORC. On March 28, 1983, An-Son and the ATEX Group entered into a Reorganization Agreement. The agreement provided that An-Son would transfer its interest in ORC to the ATEX Group. In exchange, Bell and the ATEX Group agreed to execute an Assumption Agreement, in which they would assume certain ORC-related liabilities for which An-Son could otherwise be held responsible.

At the closing on April 12, 1983, An-Son transferred to the ATEX Group[5] 100 percent of its stock in An-Son Refining, the designated An-Son company that was a

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[4] Continental Bank, N.A., was formerly known as Continental Illinois National Bank and Trust Company of Chicago ("Continental Illinois").

[5] The designated entity purchasing the stock was Atex Stations, Inc.

general partner in ORC.[6] In exchange, the ATEX Group executed an Assumption Agreement, in which it promised to indemnify certain An-Son entities for specified liabilities incurred by ORC. In addition, as a prerequisite to obtaining the Banks' release of the An-Son guarantors' guaranty obligations, Bell and the ATEX Group also executed new guaranties ("the 1983 Guaranties"), which guaranteed, among other things, the payment of all indebtedness owed by ORC to the Banks.[7] Thus, whereas before the stock sale on April 12, 1983, Bell and ATEX N.M. were liable as guarantors for 34 percent of ORC's obligations to the Banks, after that date Bell and the entire ATEX Group were jointly and severally liable for 100 percent of ORC's obligations.

3. HISTORY OF THE LITIGATION

On September 14, 1984, ORC filed a voluntary Chapter 11 bankruptcy petition. On September 25, 1984, the Banks filed suit against Bell and the ATEX Group to enforce their guaranty obligations with respect to ORC. Bell and the ATEX Group counterclaimed against the Banks, asserting federal and state securities fraud, state

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[6] In addition, An-Son Transportation Company sold 100 percent of the stock of An-Son Pipeline Company to the ATEX Group. An-Son Pipeline Company was the majority partner of Oklahoma Pipeline Company ("OPC"), which was the entity that owned the pipeline gathering system used by ORC. As in the ORC transaction, the designated entity purchasing the OPC stock was ATEX Stations, Inc.

[7] Bell and ATEX Oil Company increased their guaranties from 34 percent to 100 percent. ATEX Tx. and ATEX Rf. became 100 percent guarantors for the first time.

common law fraud, breach of contract, breach of warranty, state securities registration violations, and violations of a federal law prohibiting tying arrangements – all of which allegedly arose in connection with the Reorganization Agreement. The counterclaims stemmed from what Bell and the ATEX Group claimed was an attempt by the Banks to find a "donkey" to absorb losses the Banks expected to suffer on the ORC loans in the future. They alleged that the Banks realized that the energy market was rapidly declining, that they were undersecured on the ORC debt, that An-Son could not service its debt or ORC's debt, and that An-Son had no more property to pledge. According to Bell and the ATEX Group, the Banks therefore targeted them to take over An-Son's liability because Bell and the ATEX Group had a large amount of unencumbered property that could protect the Banks from a collateral shortfall on ORC.

Through a series of transactions, the Federal Deposit Insurance Corporation became the holder of the Banks' ORC loans. As part of a financial assistance agreement, the FDIC purchased Continental Illinois' interest in the ORC debt on September 26, 1984, and was substituted as plaintiff for Continental Illinois on April 12, 1985. In July 1986, First National was declared insolvent and closed. The FDIC was appointed as receiver for First National, and acquired First National's ORC-related debt in its corporate capacity. The FDIC was then substituted for First National as plaintiff. Once the FDIC became the holder of 100 percent of the Banks' ORC-related debt, the FDIC continued to prosecute the collection action initiated by the Banks.

On February 22, 1988, the FDIC obtained judgments in the collection action against Bell, the ATEX Group, and others for 100 percent of the then.outstanding balance of ORC's debts, $51,604,074.60. We affirmed that judgment on appeal. *FDIC v. Bell*, 892 F.2d 64 (10th Cir. 1989), *cert. denied*, 496 U.S. 913 (1990).

Meanwhile, the counterclaims asserted against Continental by Bell and the Atex Group had been severed and went to trial separately. The district court entered judgment in favor of Bell and the ATEX Group for the same amount for which they had been found liable to the FDIC on the basis of the jury's finding of common law fraud, state and federal securities fraud, and violations of the Oklahoma Securities Act registration provision. On appeal, we reversed the finding that Continental was liable for federal and state securities fraud and state common law fraud, but affirmed the finding of liability on the nonregistration count. Order and Judgment, No. 88-2274. We remanded the case for a redetermination of the damages that Bell and the ATEX Group were entitled to recover.

On remand, the district court notified the parties prior to the retrial that, under 71 Okla. Stat. Ann. § 408(a)(2) (i) and pursuant to the Tenth Circuit remand, Bell and the ATEX Group were entitled to recover the consideration they paid for the An-Son stock, plus interest, costs, and attorneys fees and less any income they received on the securities. Both sides agreed that the only consideration paid by Bell and the ATEX Group were the 1983 Guarantees and the Assumption Agreement. However, the parties disagreed on the proper method to be used in determining the value of the guarantees. At a

pretrial conference, the district court informed the parties that the consideration paid by Bell and the ATEX Group would be valued as the amount of new debt undertaken by Bell and the ATEX Group, less the value of the collateral securing the debt guaranteed.[8] Both figures were to be measured as of April 12, 1983, the date of the securities transfer.

Following a three-day bench trial, the district court on June 6, 1991, issued an opinion finding that the new amount of debt covered by the 1983 Guaranties did not exceed $51,638,265[9] and that the value of the collateral securing the bank debt was $56,460,859.40. Thus, because the value of the collateral securing the debt exceeded the value of the new debt undertaken by Bell and the ATEX Group, the district court concluded that Bell and the ATEX Group paid no valuable consideration for the securities.[10] The court therefore held that Bell and the ATEX

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[8] The district court noted that Bell and the ATEX Group objected to this standard and granted them a continuing objection.

[9] Because Bell and ATEX N.M. had already guaranteed 34 percent of ORC's debt in 1980, the new debt assumed under the 1983 Guaranties was much less than $51,638,265, ORC's total indebtedness to the Banks. However, it was unnecessary for the district court to calculate what percentage of the $51 million figure was new debt guaranteed for the first time in 1983, as any smaller figure would yield the same result – a figure less than zero.

[10] The district court also found that the income received by Bell and the ATEX Group was $4,142,136.08. However, given the court's conclusion that the value of the consideration paid was zero, it could not further reduce their recovery by the income they received.

Group should take nothing from Continental on the securities nonregistration claim.

On June 27, 1991, the district court granted Bell and the ATEX Group's motion for entry of partial final judgment on the June 6, 1991 opinion so that they could appeal the court's calculation of damages. On the same day, the district court entered a partial final judgment that incorporated the June 6, 1991 opinion decreeing that Bell and the ATEX Group take nothing from Continental.

Bell and the ATEX Group appeal the June 27, 1991 judgment and the June 6, 1991 opinion it incorporated. They contend that the district court erred (1) in its use of the formula set forth in 71 Okla. Stat. Ann. § 408 to determine their relief and (2) in applying the formula, assuming that the formula is the proper measure of their relief. Continental cross-appeals, contending that the district court erred in finding Bell and the ATEX Group to be prevailing parties entitled to attorneys' fees under the Oklahoma Securities Act. We affirm the district court's finding that Bell and the ATEX Group are not entitled to monetary relief, and we dismiss Continental's cross-appeal for lack of jurisdiction.

DISCUSSION

1. PROPRIETY OF THE DISTRICT COURT'S DAMAGES FORMULA

Bell and the ATEX Group first contend that the district court did not use the proper formula under Oklahoma law to determine the amount of relief to which they are entitled. The district court decided that under 71

Okla. Stat. § 408, Bell and the ATEX Group were entitled to the consideration they paid for the An-Son securities, plus interest, costs, and attorneys fees and less any income they received on the securities. Bell and the ATEX Group, however, argue that § 408 requires a court to apply equitable principles and to return the victims to the position they were in before the securities transaction took place. Because rescission is now impossible, Bell and the ATEX Group assert that they can only be restored to the status quo ante if Continental indemnifies them for the judgment that the FDIC won against them on the 1983 Guarantees.[11]

We review de novo a district court's interpretation of state law. *Salve Regina College v. Russell*, 111 S. Ct. 1217, 1221 (1991). *Downriver Community Federal Credit Union v. Penn Square Bank*, 879 F.2d 754, 758 (10th Cir. 1989), *cert. denied*, 493 U.S. 1070 (1990). However, assuming that equitable relief is authorized, a district court has "considerable discretion" in fashioning an appropriate equitable remedy under the circumstances. *Stichting Mayflower Recreational Fonds v. Newpark Resources*, 917 F.2d 1239, 1245 (10th Cir. 1990); *see Leathers v. Commercial Nat'l Bank*, 410 P.2d 541, 545 (Okla. 1966). We therefore will only review

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[11] We reject Continental's contention that Bell and the ATEX Group did not raise this argument before the trial court. While Bell and the ATEX Group may not have used the term "indemnity" in challenging the district court's formula for calculating damages, it consistently maintained that the appropriate remedy under § 408 would be the functional equivalent of cancelling the liabilities they incurred as a result of the securities transaction. In addition, the district court recognized that Bell and the ATEX Group disagreed with its calculation method.

an award of equitable relief for an abuse of discretion. *Downriver*, 879 F.2d at 758; *EEOC v. General Lines, Inc.*, 865 F.2d 1555, 1559 (10th Cir. 1989). Applying these standards, we hold that although the Oklahoma statute governing Bell and the ATEX Group's recovery permits equitable relief, the district court did not abuse its discretion in fashioning its remedy.

The Oklahoma Securities Act permits both equitable and legal remedies for violations of its provisions. The statute governing remedies for violations of the state's nonregistration law provides that the seller of an unregistered security in violation of 71 U.S.C. § 301 is liable:

> to the person buying the security from him, who may sue either at law or in equity to recover the consideration paid for the security, together with interest at ten percent (10%) per year from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security. . . .

71 Okla. Stat. Ann. § 408 (a) (2) (A).[12] Section 408(1) explicitly provides that the rights and remedies provided for in Title 71 "are in addition to other rights or remedies that may exist in law or equity."[13] Furthermore, the Oklahoma Supreme Court has observed that "the District Courts of Oklahoma are empowered to do equity in

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[12] This provision was formerly codified as 71 Okla. Stat. Ann. § 408(a) (1) (i). We will refer to the current codification.

[13] This provision was previously codified as 71 Okla. Stat. Ann. 408(i). We will refer to the current codification.

actions brought under the Oklahoma Securities Act." *State ex rel. Day v. S.W. Mineral Energy, Inc.*, 617 P.2d 1334, 1338 (Okla. 1980). However, although a trial court is clearly authorized to grant equitable relief under the Oklahoma Securities Act, nothing in the Act or in Oklahoma case law *requires* a trial court to exercise its equitable powers, much less to exercise it in the way desired by Bell and the ATEX Group.

Even if the district court were required under Oklahoma law to exercise its equitable powers, it is clear from its opinion that the court believed that it was doing so – although perhaps not in the manner that Bell and the ATEX would have preferred. The district court observed that § 408 permitted it to fashion an ATEX Group's guarantees at the face amount of the new debt they guaranteed, while ignoring the value of the collateral. It thus concluded that "[t]he most equitable value of the guarantees in this case is the amount of the new debt undertaken, less the value of the collateral used to secure the debt." *Id.* Later in the opinion, the court repeated its conclusion, stating that "[t]he measure of damages, determined in light of the court's goal of achieving equity . . . is the amount of new debt undertaken, reduced by the amount of collateral securing the debt." D.C. Op. 6.7, *reprinted in* Aplt. App. 779-80. We cannot say that the district court's exercise of its equitable power to choose this damages formula was an abuse of discretion.

Indeed, forcing Continental to indemnify Bell and the ATEX Group for the entire judgment against them would be inequitable in light of Bell and the ATEX Group's responsibility for much of the shortfall in the collateral securing the debt. "It is a fundamental principle of equity

jurisprudence that 'He who comes into equity must come with clean hands.' " *Leathers v. Commercial Nat'l Bank*, 410 P.2d 541, 546 (Okla. 1966). "Equity will not lend its aid to one seeking its active interposition, who has been guilty of unlawful or inequitable conduct in the matter with relation to which he seeks relief." *Id.* (citations and quotations omitted).

Bell and the ATEX Group were arguably responsible for perhaps $20 million of the collateral shortfall on the guaranteed debt, as they (1) took $4.1 million in gas from ORC without paying for it, (2) decreased cash on hand at ORC from $8 million on April 12, 1983 to zero on the date that ORC filed for bankruptcy, and (3) restructured ORC's revolving debt to the Banks so that $8 million could be borrowed without a showing of current assets as collateral (previously, current assets had to exceed ORC's revolving and letter-of-credit debt). Moreover, because they were 100 percent owners of ORC, Bell and the ATEX Group may be considered responsible for the remainder of the collateral shortfall because they chose to continue operating ORC and to risk a drop in the collateral value rather than to liquidate it and use the collateral to pay off the guaranties. That is, at the time that Bell and the ATEX Group executed the 1983 Guaranties, the debt they guaranteed was fully secured. As Bell testified, he and the ATEX Group could have shut down and liquidated ORC the day after he and the ATEX Group purchased it, and paid off the guaranties. *Id.* However, they chose to continue operating and risk the possibility that the value of the collateral might decrease. It would be inequitable now to permit Bell and the ATEX Group to shift that risk onto Continental. Given that Bell and the ATEX Group

were responsible for most of the collateral shortfall, the fact that they had to pay the FDIC on the 1983 Guaranties is largely attributable to their own actions. Consequently, we cannot say that the district court's formula for assessing Bell and the ATEX Group's relief was inequitable.

2. WHETHER THE DISTRICT COURT PROPERLY APPLIED THE DAMAGE FORMULA

Bell and the ATEX Group next assert that even if we find that the district court correctly decided to measure their damages by reference to the consideration they paid at the time of the securities transaction, the court nevertheless incorrectly applied the formula to the facts of this case. Under the formula applied by the district court, Bell and the ATEX Group were entitled to recover the consideration they paid for the securities, plus interest, costs, and attorneys fees and less any income they received on the securities. At trial, both sides agreed that the only consideration paid by Bell and the ATEX Group were the 1983 Guaranties and the Assumption Agreement; however, questions arose as to how to value the 1983 Guaranties and what types of debts the Assumption Agreement encompassed. On appeal, Bell and the ATEX Group argue that (1) the district court improperly included the value of the ORC collateral securing the debt that they guaranteed in its calculation of the value of the guaranties, and (2) the district court failed to include in its valuation of the consideration $25 million in non-bank debt that they assert was assumed under the Assumption Agreement. We will address each contention in turn.

A. Inclusion of the ORC collateral

Bell and the ATEX Group first assert that the district court improperly calculated the value of part of the consideration they paid for the securities – the 1983 Guarantees – by calculating it in reference to the value of the collateral securing the debt. More specifically, the district court concluded that the value of the 1983 Guaranties consisted of the amount of new debt that they guaranteed, minus the value of the ORC collateral securing the debt at the time of the transaction. Because the court found that the value of the collateral exceeded the amount of the new debt, it concluded that the value of the 1983 Guaranties was zero at the time of the transaction. Bell and the ATEX Group contend it was error to take into account the value of the collateral in valuing the guaranties for three reasons: (1) in doing so, the district court essentially used the value of the stock received by Bell and the ATEX Group to determine the value of the guarantees; (2) Bell and the ATEX Group had no right to reimbursement from ORC's assets in the event they were called to pay on a guaranty; and (3) the proper value of the guarantees is the face value of the guaranties.

1. Use of stock value to value guarantees

First, Bell and the ATEX Group contend that the district court's method for valuing the 1983 Guarantees was, in reality, a rough valuation of the securities sold. They point out that all of ORC's liabilities to the Banks were secured by virtually all of ORC's assets; thus, they contend, subtracting the value of ORC's assets as of April

12, 1983 from ORC's liabilities approximates the "book value" of the securities. They contend that this was error, as the district court was supposed to determine the value of what they gave in consideration, not the value of the securities they received, in determining their relief. *Cf. Wigand v. Flo-tek, Inc.*, 609 F.2d 1028, 1036 (2d Cir. 1979) (stating that "[t]he value of the stock itself is irrelevant insofar as relief under section 12(2) [of the Securities Act of 1933] is concerned") We disagree with this analysis on several different levels.

It is clear that the district court was not calculating the book value of the stock. For example, the district court considered only the ORC's obligations to the Banks and not ORC's nonbank debts, which was approximately another $25 million. In addition, the court made no effort to consider the speculative value of the stock or to consider all the factors that might add or subtract from the net asset value in determining stock value. Regardless of whether the stock value and the value of the consideration paid by Bell and ATEX were similar or not, the fact remains that the district court's formula was directed at determining the consideration paid and not the stock value.

2. Guarantors' access to ORC collateral

Bell and the ATEX Group next contend that the district court erred in including the collateral in its calculation of the value of the guaranties because they had no rights to ORC's assets in the event their guaranties were called. We find this argument to be without merit.

Oklahoma law explicitly provides a guarantor the right to reimbursement from the debtor for any payments made as a surety. 15 Okla. Stat. Ann. § 382.[14] The 1983 Guaranties required that before ORC could reimburse Bell and the ATEX Group for payments made on the guaranties, ORC's debts to the Banks must first have been paid in fu11.[15] However, this requirement does not mean that the guarantors were never entitled to reimbursement from the collateral nor that the assets of ORC could not be used to pay off the bank debt. Because the collateral potentially reduced Bell and the ATEX Group's liability to the Banks, we cannot conclude that the district court erred in calculating the value of the 1983 Guaranties by reference to the value of the collatera1.[16]

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[14] Section 382 provides:

> A surety upon satisfying the obligations of the principal is entitled to enforce every remedy which the creditor then has against the principal to the extent of reimbursing what he has expended.

Under Oklahoma law, there is no distinction between a suretyship and a guaranty. *Lum v. Lee Way Motor Freight, Inc.*, 757 P.2d 810, 817 n.25 (Okla. 1987) (citations omitted).

[15] The 1983 Guaranties provide:

> Performance by the Guarantor hereunder will not entitle the Guarantor to any payment by the Borrower under a claim for contribution, indemnification, subrogation or otherwise, until such time as the Borrower shall have paid in full all amounts owing to the Banks and shall have performed all of the Borrower's Obligations under the Loan Documents.

Tr. 872 (ATEX N.M); 877 (ATEX Tx.); 882 (ATEX Rf.).

[16] We do not believe that Paragraph 2(c) of the 1983 Guaranties, which permitted the Banks to release ORC's collateral without changing the guarantors' obligation, requires a different result. As we noted in Part I, the district court did not err in

The cases cited by Bell and the ATEX Group in support of their position are inapposite. These cases merely state that a guarantor may not decline to pay an obligation under a continuing guaranty merely because the value of the collateral was impaired, *see First City Bank, N.A. v. Air Capitol Aircraft Sales, Inc.*, 820 F.2d 1127, 1133-34 (10th Cir. 1987), or that the creditor need not sue the principal before suing the guarantor, *Riverside Nat'l Bank v. Manolakis*, 613 P.2d 438, 440-41 (Okla. 1980).

3. *Face value of guaranties*

Bell and the ATEX Group next argue that the district courtshould have set the value of the guaranties at their full face value. We disagree.

A guaranty is only a contingent liability. Whether the liability will materialize depends upon whether the debtor will be able to pay the liability secured by the guaranty. Accordingly, the value of the guaranty is not determined solely by its face value, but instead is a function of the debtor's assets, the likelihood that the guaranty will be called, and the guarantor's ability to pay it if it is called.

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measuring the value of the guaranties as of the time of the transaction, and at the time of the transaction, none of the collateral had been released. Moreover, Bell and the ATEX Group do not even allege that the Banks in fact released any of the collateral securing the loans. We therefore cannot conclude that it was inequitable to include the value of the collateral in the calculation of the guaranties' value, despite the collateral release provision in the guaranties.

The notion that the value of a guaranty is not equivalent to its face value was recognized in *In re Xonics Photochemical, Inc.*, 841 F.2d 198 (7th Cir. 1988). In dicta, the *Xonics* court noted that it was improper to consider a corporation to be insolvent for purposes of whether a particular transfer was a preference under the bankruptcy code, where the face value of the corporation's guaranties exceeded its assets. *Id.* at 199. The court reasoned that to value a contingent liability, such as a guaranty, it is necessary to discount it by the probability that the contingency would occur and the liability would materialize. *Id.* at 200; *see Nordberg v. Arab Banking Corp. (In re Chase & Sanborn Corp.)*, 904 F.2d 588, 594 (11th Cir. 1989) (citing *Xonics*, 841 F.2d at 200); *Sierra Steel, Inc. v. Totten Tubes (In re Sierra Steel, Inc.)*, 96 B.R. 275, 279 (Bankr. 9th Cir. 1989) (citing *Xonics*, 841 F.2d at 200). Thus, the court concluded that the value of the guaranty in issue was not equal to its face value. *See id. Xonics* and its progeny suggest that the district court did not err in refusing to set the value of the 1983 Guaranties at their face value.

Moreover, we reject Bell and the ATEX Group's argument that refusing to set the value of the guaranties at their face value was inequitable because it did not place them in the position they occupied before the buy out transaction took place. As in Part I, we believe it would be inequitable to give Bell and the ATEX Group the benefit of the full face value of the guaranties, when they are largely responsible for the collateral shortfall that rendered them liable for most of ORC's debts to the Banks.

B. The district court's refusal to include nonbank debt

Bell and the ATEX Group next contend that the district court erred in calculating the value of the 1983 Guaranties because the court failed to consider $25 million in nonbank debt that they assert they assumed in the Assumption Agreement. We agree with the district court's finding that the Assumption Agreement did not encompass the nonbank debt.[17]

The district court properly interpreted the Assumption Agreements, which plainly stated that the obligations assumed by the promisors under the Assumption Agreement were the personal obligations owed by the indemnified parties, and not all debts owed by ORC as urged by Bell and the ATEX Group. The relevant provision of the Assumption Agreement states:

> Each of the indemnitors [ATEX Tx., ATEX Stations, and Bell] jointly and severally, hereby *assume and agree to pay, perform, fulfill and discharge, and to indemnify and hold harmless each of the Indemnified Parties* [An-Son Corp., An-Son Transportation Co., and Carl Anderson], including the officers, directors and stockholders of any corporation included therein, from and against any and all liabilities, obligations,

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[17] The district court also rejected Bell and the ATEX Group's argument regarding the assumption of the nonbank debt on the alternative ground that they failed timely to raise it. We find it unnecessary to consider whether Bell and the ATEX Group waived this argument because we find on the merits that the Assumption Agreements clearly did not encompass the nonbank debt.

> claims, losses, damages, costs or expenses of any kind or character of Oklahoma Refining Company ("ORC"), an Oklahoma general partnership. . . .

Aplt. App. 944. Under Oklahoma law, the interpretation of an unambiguous contract is a matter of law, *Cook v. Oklahoma Bd. of Public Affairs*, 736 P.2d 140, 145 (Okla. 1987), as is the question of whether a contract is ambiguous, *Ferrell Constr. Co. v. Russell Creek Coal Co.*, 645 P.2d 1005, 1007 (Okla. 1982). The terms of an unambiguous contract are to be accepted in their plain and ordinary sense. *Dodson v. St. Paul Ins. Co.*, 812 P.2d 372, 376 (Okla. 1991). After considering the punctuation and syntex of this language, we believe it unambiguously states that the indemnitors agree to assume the liabilities of the indemnified parties that relate to ORC. The only ORC-related liabilities that the indemnified parties had were the guaranties that they executed in 1980 guarantying 66 percent of ORC's debt to the Banks.[18] We therefore cannot say that the district court erred in holding that the Assumption Agreement encompassed only the An-Son parties' liabilities relating to ORC's bank debt.

3. ATTORNEYS' FEES

In a cross-appeal, Continental contends that Bell and the ATEX Group should not be awarded attorneys fees if

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[18] There were two versions of the Assumption Agreement before the district court. The version quoted in the text was offered by Continental and was found by the district court to be the "true" version. Aplt. App. 783. We accept that finding, and thus the indemnified parties are limited to those listed therein.

they are not awarded any monetary relief. Section 408(a)(2) provides that the purchaser of securities that violate the nonregistration provision of § 301 may sue for, among other things, attorneys fees. Additionally, § 408(i) provides that "[a]ny plaintiff who prevails in an action brought under [§ 408(a) (1) or (a) (2) or § 408(c) (1) or (c) (2)] may recover his reasonable attorneys' fees and costs in the action from the defendant." Continental contends that if we affirm the district court's take-nothing judgment in favor of Bell and the ATEX Group, Bell and the ATEX Group cannot be considered prevailing parties within the meaning of § 408(i). Although Continental raises this issue, it also suggests that this issue may not properly be before us because the district court did not include it in its partial final judgment. We agree.

The partial final judgment determined that Bell and the ATEX Group were prevailing parties entitled to attorney's fees; however, the court deferred a determination of the amount of attorney's fees to be awarded. We have held that an order awarding attorney's fees is not final until the amount of the fees is determined. *Pennsylvania Nat'l Mutual Casualty Insurance Co. v. City of Pittsburg, Kansas*, 987 F.2d 1516 (10th Cir. 1993); *Phelps v. Washburn University of Topeka*, 807 F.2d 153, 154 (10th Cir. 1986). If an order is not, in fact, a final order disposing of a claim, then it cannot properly be certified under R.R.C.P. 54(b) as final. *Strey v. Hunt International Resources Corp.*, 696 F.2d 87, 88 (10th Cir. 1982); *Wheeler Machinery v. Mountain States Mineral Enterprises, Inc.*, 696 F.2d 787, 789 (10th Cir. 1983).

Although it is not entirely clear whether the district did or did not intend to certify the ruling that Bell and

the ATEX Group were prevailing parties entitled to attorney's fees, it is clear that such a certification would be ineffective on the record because the amount of the attorney's fees has not yet been established. Accordingly, we lack jurisdiction to consider that issue on this appeal.

AFFIRMED.

Entered for the Court

David M. Ebel
Circuit Judge

APPENDIX 2

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

THE FIRST NATIONAL BANK AND TRUST COMPANY OF OKLAHOMA CITY, and CONTINENTAL ILLINOIS NATIONAL BANK AND TRUST COMPANY OF CHICAGO,	)	
Plaintiffs,	)	No. CIV-84-2386-P
v.	)	
RAY BELL, ATEX OIL COMPANY, ATEX OIL COMPANY OF TEXAS, ATEX STATIONS, INC., ATEX REFINING COMPANY and ANDERSON-PRICHARD PIPE LINE CORPORATION,	)	
Defendants,	)	
ED ALEXANDER, an individual, TRUDY PERRY, an individual, JERRY PEARSON, an individual, DEREK MORRISON, an individual, and AN-SON CORPORATION, A Delaware corporation,	)	Consolidated
Third Party Defendants.	)	
FEDERAL DEPOSIT INSURANCE CORPORATION, an agency of the United States of America, *et al.*,	)	
Plaintiffs,	)	
v.	)	
ATEX OIL COMPANY OF OKLAHOMA, INC., *et al.*,	)	No. CIV-86-1762-P
Defendants,	)	

ATEX OIL COMPANY OF OKLAHOMA, INC., *et al.*, Third Party Plaintiffs, v. ED ALEXANDER, *et al.*, Third Party Defendants.	)))))))	JOURNAL ENTRY OF JUDGMENT (Filed April 4, 1988)

This action came on for trial before the Court and jury, Honorable Layn R. Phillips, District Judge, presiding. The issues having been duly tried, the jury rendered its verdict in favor of plaintiffs Ray Bell, Atex Oil Company, Atex Oil Company of Texas, Atex Stations, Inc. and Atex Refining Company ("Atex Group") and against defendant Continental Illinois Bank & Trust Company of Chicago ("CINB") and responded to special interrogatories as follows:

A. PLAINTIFF'S FRAUD CLAIMS

1. Do you find by clear and convincing evidence that the Atex Group was defrauded by Continental when the Atex Group purchased An-Son's interest of ORC as a result of Continental's alleged misrepresentations of ORC's value? *Waived by plaintiffs' counsel after jury unable to answer unanimously.*

2. Do you find by clear and convincing evidence that the Atex group was defrauded by Continental when the Atex group purchased Anson's interest of ORC as a result of Continental's failure to disclose material information regarding the value of ORC to the Atex group? *Yes.*

3. Do you find by clear and convincing evidence that the Atex Group was defrauded by

Continental when the Atex mortgaged property and pledged stock on June 18, 1984 as a result of Continental's alleged promise to provide ten year refinancing? *Waived by plaintiffs' counsel after jury unable to answer unanimously.*

B. PLAINTIFF'S SECURITIES CLAIMS

1. Do you find by a preponderance of the evidence that Continental Illinois Bank violated Rule 10(b)-5 of the Securities Act of 1934? *Yes.*

2. Do you find by a preponderance of the evidence that Continental Illinois Bank violated Section 12(2) of the Securities Act of 1933? *Yes.*

3. Do you find by a preponderance of the evidence that Continental Illinois Bank violated Section 408(a)(1) of the Oklahoma Securities Act? *Yes.*

4. Do you find by a preponderance of the evidence that Continental Illinois Bank was a "substantial factor" in the sale of the Anson securities? *Yes.*

5. Do you find by a preponderance of the evidence that Continental Illinois Bank was a "controlling person" with respect to Anson Transportation Company and Anson Refining Company during the April 1983 sale of ORC.? *Yes.*

The jury returned its verdict in favor of the Atex Group and against CINB for the sum of $51,000,000, having been inadvertently instructed that the Atex Group presently had a judgment against it in that amount (rather than in the amount of $51,604,074.30) and that the

maximum verdict the jury could return was $51,000,000 (rather than $51,604,074.30).[1]

In accordance with the Court's order entered this same date, the Court hereby adjusts the amount of the verdict against CINB from $51,000,000 to $51,604,074.30.[2]

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Atex Group have judgment against CINB in the amount of fifty-one million, six hundred four thousand, seventy-four dollars and thirty cents ($51,604,074.30), together with interest thereon at the rate of 6.71% as provided by law, and their costs of the action.

DATED at Oklahoma City, Oklahoma this 4th day of April, 1988.

/s/ Layn R. Phillips
LAYN R. PHILLIPS
United States District Judge

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[1] Instruction Number 11, and Court's Exhibits Number 15 and Number 16 (Jury's question and Court's response).

[2] While the Court believes the Atex Group may have arguably waived their right to seek the full amount of the summary judgment as damages since they failed to object to the amount listed in the jury instructions, the Court finds that in light of all of the facts and circumstances surrounding this issue, $604,074.30 is too severe a penalty for failure to object to a typographical error in the instructions. *See,* Order Adjusting Amount of Jury Verdict, April 4, 1988.

APPENDIX 3

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

FEDERAL DEPOSIT INSURANCE CORPORATION, Plaintiff,	)	
FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of First National Bank and Trust Company of Oklahoma City, Oklahoma, Plaintiff/Counterclaim Defendant,	)	No. 88-2229 (D.C. No. CIV-84-2386-P) (W.D. Oklahoma)
CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO, Plaintiff/Appellant,	)	
v.	)	
RAY BELL; ATEX OIL COMPANY; ATEX OIL COMPANY OF TEXAS; ATEX STATIONS, INC.; ATEX REFINING COMPANY; ANDERSON-PRICHARD PIPE LINE CORPORATION; ATEX OIL COMPANY OF OKLAHOMA INC.; OKLAHOMA PIPELINE CO.; ANSON PIPELINE CO.; ANSON REFINING CO.; and ATEX PIPELINE CO., Defendants/Appellees,	)	
and	)	
MEREDITH R. SHEETS, INC., Defendant,	)	

ATEX OIL COMPANY OF OKLAHOMA INC.; ATEX PIPELINE CO.; and OKLAHOMA PIPELINE CO.,

Defendant/Third-Party Plaintiff,

v.

TRUDY PERRY,

Third-Party Defendant.

FEDERAL DEPOSIT INSURANCE CORPORATION,

Plaintiff/Appellee,

and

CONTINENTAL ILLINOIS NATIONAL BANK & TRUST COMPANY OF CHICAGO,

Plaintiff,

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver of First National Bank and Trust Company of Oklahoma, City, Oklahoma, N.A.,

Plaintiff/Counterclaim Defendant,

v.

RAY BELL; ATEX OIL COMPANY; ATEX OIL COMPANY OF TEXAS; ATEX STATIONS, INC.; and ATEX REFINING COMPANY,

Defendants/Appellants,

and

No. 88-2274
(D.C. No. CIV-84-2386-P)
(W.D. Oklahoma)

ANDERSON-PRICHARD PIPE LINE CORPORATION; ATEX OIL COMPANY OF OKLAHOMA INC.; OKLAHOMA PIPELINE CO.; ANSON PIPELINE CO.; ANSON REFINING CO.; ATEX PIPELINE CO.; and MEREDITH R. SHEETS, INC.,

Defendants,

ATEX OIL COMPANY OF OKLAHOMA INC.; ATEX PIPELINE CO.; and OKLAHOMA PIPELINE CO.,

Defendants/Third-Party Plaintiffs,

v.

TRUDY PERRY,

Third-Party Defendant.

ORDER AND JUDGMENT*
(Filed April 24, 1990)

Before MOORE, BRORBY, and EBEL, Circuit Judges.

This appeal is a companion to *Federal Deposit Ins. Corp. v. Bell*, 892 F.2d 64 (10th Cir. 1989), in which we held

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* This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

that 12 U.S.C. § 1823(e) shields the FDIC from defenses raised in its action to recover on certain loan guaranties. The FDIC's judgment of $51,604,074.30 was subsequently funded, in essence, when a jury awarded Ray Bell, guarantor of those loans, $51,604,074.30, on his counterclaims for common law and securities fraud against the lending bank, Continental Illinois National Bank & Trust Company of Chicago (CINB). That judgment was predicated on Bell's theory that CINB fraudulently induced him to assume all of the guaranties pledged in the acquisition of two refineries. Although the jury eschewed the conclusion that CINB misrepresented the value of the refineries, the jury found CINB failed to disclose material information which, Bell asserted, would have altered his decision to increase his guaranties. CINB now appeals the adverse verdict on the ground that liability for nondisclosure arises only from a duty to disclose. Because we conclude CINB had no duty to disclose, Bell's central counterclaims collapse. We reverse the judgment in part and remand for a new trial on damages.

I. Background

The facts of this case echo many of the reverberations experienced in the oil industry in the early 1980's. In 1978, An-Son, a group of companies involved in crude oil production, and Atex Refining Company, which operated a chain of hundreds of gasoline stations, formed the Oklahoma Refining Company (ORC), to acquire two refineries in Cyril and Thomas, Oklahoma. Carl Anderson, a principle in An-Son, assumed a 66% share of the guaranties securing the refineries' purchase, and Ray Bell, who controlled Atex, assumed the remaining 34% of liability. Term and revolving loans

from CINB and First National Bank of Oklahoma City[1] funded ORC's acquisitions and operations. While An-Son supplied crude oil to the ORC refineries, Atex looked to ORC as a source of supply for its retail stations. As a board member, Bell attended ORC's monthly management meetings and received written reports of the refineries' production and financial condition.

In the early 1980's, CINB increased its loans to An-Son, with which it had a long-standing lending relationship, to finance both ORC and An-Son's exploration program. Nevertheless, during this period, CINB's in-house staff of refinery engineers, which monitored the market values of refineries in CINB's loan portfolio, reassessed ORC, estimating that its value declined from $35.2 million to $22.3 million. Subsequently, CINB issued one of several internal "Watch Loan Reports" on ORC, indicating the need for special supervision of the account.

In the early months of 1983, Bell met with various individuals[2] to discuss the prospect of adding the two ORC refineries to his then-existing refinery in Tonkawa, Oklahoma.[3] Already familiar with the operations of the Cyril and Thomas plants and always concerned about assured sources

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[1] First National Bank (FNB) was not a party in the underlying lawsuit.

[2] According to Bell, he met privately with Derek Morrison, CINB's representative responsible for the ORC loans, and discussed the value of the ORC refineries and CINB's continued willingness to fund the ORC operation.

[3] Bell had already discussed buying the remaining interests in ORC with Ed Alexander, a senior vice-president at FNB of Oklahoma City. FNB was a principal lender to Atex and participated in loans to ORC.

of refined products for his stations, Bell was receptive to structuring a deal that would give him a majority position in ORC. In late March, a reorganization agreement was executed in which one of Bell's Atex Companies, Atex Stations, Inc., acquired An-Son's interest in ORC.[4] In exchange for Bell's assuming Anderson's guaranties, CINB restructured ORC's debt, refinancing one of ORC's large receivables and making letters of credit available to continue keeping the refineries in operation. Despite monthly increases in letters of credit bringing the total facility to approximately $99.8 million by June 1984, the refineries were unable to overcome the continuing shock waves rippling through the industry as oil prices went into a free-fall. In September 1984, despite six refinancings of the operating debt, ORC filed a petition under Chapter 11.

As the ensuring proceedings played out, the FDIC[5] recovered a judgment from Bell for $51,604,074.30 on his personal guaranties of the ORC debt. Bell's counterclaims for common law fraud and securities fraud against CINB were tried to a jury. The core of Bell's theory was the alleged conversation he had with Derek Morrison, who supervised the ORC loans, in which Morrison stated that ORC's refineries were worth $47 million and promised

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[4] Anson Refinery Company, ANRC, was the vehicle through which An-Son held its interest in ORC. In the agreement, An-Son sold 50,000 shares of ANRC common stock to Atex Stations, Inc., the Atex entity which purchased the stock, although it was not a party to the lawsuit.

[5] In late 1984, FDIC granted special assistance to CINB and acquired the ORC loan and right to sue on the guaranties. CINB, however, remained liable for the counterclaims asserted in the foreclosure action.

CINB's continued financing. On the basis of those representations, Bell contended, he pledged his assets and assumed the risk of 100% of the ORC guaranties. Bell presented evidence that CINB misrepresented the value of the refineries and did not disclose key internal loan documentation in order to protect its customer, Carl Anderson, and salvage its own lending position. In defense, CINB depicted Bell as a sophisticated businessman who was intimately familiar with ORC's financial problems by virtue of his regularly attending monthly board meetings. According to CINB, Bell, against advise of his own refinery men, undertook the risk not only hoping to secure a source of gas for his stations but also believing he could turn his investment around over a five-year period.

The jury returned special interrogatories which separated the common law fraud and securities claims. The jury did not answer the first question:

> 1. Do you find by clear and convincing evidence that the Atex Group was defrauded by Continental When the Atex Group purchased An-Son's interest of ORC as a result of Continental's alleged misrepresentations of ORC's value?

The jury answered yes to the second question:

> 2. Do you find by clear and convincing evidence that the Atex group was defrauded by Continental when the Atex group purchased Anson's interest of ORC as a result of Continental's failure to disclose material information regarding the value of ORC to the Atex group?

The jury did not answer the third question:

> 3. Do you find by clear and convincing evidence that the Atex Group was defrauded by Continental when the Atex [sic] mortgaged property and pledged stock on June 18, 1984 as a result of Continental's alleged promise to provide ten year refinancing?

In response to the securities claims, the jury found CINB violated Rule 10(b)-5 and Section 12(2) of the Securities Act of 1933 and Section 408(a)(1) of the Oklahoma Securities Act, and that CINB was a "substantial factor" in the sale of the An-Son securities and a "controlling person" of Anson Transportation Company and Anson Refining Company when ORC was sold. Although the jury returned a $51 million verdict based on the court's instruction, the court adjusted the amount upon finding that the additional $604,074.30 difference with the FDIC judgment was "too severe a penalty for failure to object to a typographical error in the instructions."

In a subsequent hearing, the district court equated the jury's failure to answer the first and third questions with a no answer[6] and rejected CINB's reserved argument that the omission theory should not have been submitted to the jury. The court suggested a number of inferences based on the evidence, "but one inference that

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[6] The parties continue to argue whether the failure to answer questions one and three is deemed a waiver of these issues or is tantamount to a no answer. The technical response to this question, however, does not affect the arguments of this appeal.

could have been drawn was that Continental Bank arguably knew that if they disclosed the information that was in question with respect to the nondisclosure allegation that Atex wouldn't buy or go through with the purchase." (R. I, Motion Hearing March 25, 1988, at 11). CINB now appeals the denial of its motions for directed verdict, j.n.o.v., and new trial, on the issues of common law fraud, securities violations, and damages.

II. Omission Theory

CINB contends that the jury's finding no misrepresentation was made to Bell annihilates the basis on which the jury could find CINB failed to disclose material information. CINB urges the omission theory must be predicated on a duty to disclose arising either from a special relationship or by undertaking to offer information. Since there was no fiduciary relationship between CINB and Bell, and the jury found CINB had not undertaken to disclose information when it found no misrepresentation, the omission theory must fail.

Bell counters that CINB's contention should be rejected because it attempts to create an inconsistency in the jury's verdict. Any representation, Bell asserts, triggers a duty to disclose. When information is particularly within CINB's knowledge and it ventures to make some representation, Bell maintains CINB is bound to tell the whole truth, offering Oklahoma statutes and case law as authority.[7]

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[7] Bell also relies on an unpublished order of this court, *Spiva v. Bryant*, No. 86-2317 (10th Cir. 1988). Tenth Cir. R. 36.3

Were all representations to trigger a duty to disclose, we would throw a wild card into our current deck of commercial relations. Thus, to make a representation actionable it must be dealt from a duty to disclose arising either from a fiduciary relationship or the offering of some information after inquiry is made. Nothing in Oklahoma's common law of fraud or Rule 10b-5 suggests an affirmative duty to disclose all material information absent this foundational nexus.[8]

For example, recently in *MSA Tubular Prods., Inc. v. First Bank and Trust Co.*, 869 F.2d 1422 (10th Cir. 1989), we held that a bank which undertakes to make representations of material facts in response to a credit inquiry has "the duty to either remain silent or to tell the truth." *Id.* at 1424 (citing *Deardorf v. Rosenbusch*, 201 Okla. 420, 206 P.2d 996 (1949)). In *MSA Tubular*, plaintiff had called defendant bank whose name had been given as a reference for its customer's credit. Despite the customer's history of overdrafts known to the bank officers, the bank told plaintiff the customer's account had average deposits sufficient to clear a $95,000 check drawn on the account. Citing *Uptegraft v. Dome Petroleum Corp.*, 764 P.2d 1350 (Okla. 1988), we reversed the district court's holding on summary judgment that the bank owed plaintiff no duty. Although Oklahoma courts had not precisely addressed

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states "[u]npublished opinions and orders and judgments have no precedential value and *shall not be cited.*" (Emphasis added.)

[8] *See Starkman v. Marathon Oil Co.*, 772 F.2d 231, 238 (6th Cir. 1985), *cert. denied*, 475 U.S. 1015 (1986), noting "the established view . . . that a 'duty to speak' must exist before the disclosure of material facts is required under Rule 10b-5." (citation omitted).

this question, we held that Oklahoma law imposes liability if "[o]ne who assumes to speak when under no duty to do so [ ] suppress[es] pertinent facts or state[s] less than the whole truth." *Id.* at 1353.[9]

Similarly, in *Grubb v. Federal Deposit Ins. Corp.*, 868 F.2d 1151 (10th Cir. 1989), plaintiff recovered a judgment against First National, his bank, for violations of federal and state securities laws and common law fraud based upon the bank's failure to disclose material information when plaintiff purchased bank securities from First National. In its discussion of whether plaintiff's reliance was justified, the court stated, "Although Grubb had dealt with First National in prior loan transactions, First National owed Grubb no fiduciary duty to disclose that it conducted its own examination of Security State's loan portfolio. Nevertheless, ample evidence shows that First National Volunteered information about that examination and affirmatively misrepresented its results." *Id.* at 1164.

In both *MSA Tubular* and *Grubb*, the duty to disclose may ultimately be created by the initial inquiry.[10] However, if you don't ask, you can't hold another liable for not telling you what later allegedly caused the harm. Nor

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[9] The *Uptegraft* case involved the partial disclosure of information from one co-tenant to another. Although Oklahoma does not recognize a fiduciary duty between co-tenants, *see Heggem v. Kilpatrick*, 133 Okla. 145, 271 P. 643, 647 (1928), the *Uptegraft* court stated that while silence "violate[s] no rule of equity, yet, if he volunteers to speak and to convey information which may influence the conduct of the other party, he is bound to disclose the whole truth." 764 P.2d at 1354.

[10] In *Grubb*, the district court granted the bank's motion for directed verdict on the claim of breach of fiduciary duties.

can inferences drawn from the act itself substitute for the inquiry. Thus, in our case, for Bell to premise liability on CINB's failure to disclose key information exclusively in its control, Bell had to prove (1) the inquiry was made, and (2) a false or an incomplete response, only half of the truth, was given. We cannot infer either element solely from the fact of the ultimate purchase.

In his direct testimony, Bell relates FNB's first discussing his purchase of ORC and a series of management meetings with CINB representatives during which conversations about ORC took place. Bell testified that in March 1983, he and Derek Morrison met privately before a management meeting. During this meeting, Bell stated Morrison told him the refineries were worth $47 million (R. VI, 203), and CINB would issue all letters of credit necessary to run the refineries. (R. VI, 205). In cross-examination, defense counsel asked Bell why during six depositions he had never discussed the alleged private meeting with Morrison and questioned Bell about ORC's financial statements and his conversations with Anderson and Morrison. Bell's testimony established that he understood the liquidation value of the refineries as a means of calculating how much would be transferred in the deal. In response to the question asked in one deposition whether he had checked around about other refinery sales, Bell answered he had not, explaining:

> No, sir, I felt that this was worth it and it would have been worth it had the banks continued to provide us letters of credit. And it would have been worth it and we'd have paid it off. It wouldn't have made any difference what it was worth, but it would have been worth it to us. . . .

> Obviously, I thought it was worth it or I wouldn't of [sic] gone forward.

(R., 315-16).

In contrast, Bell's key actor, Morrison, testified that he was first introduced to Bell at the March ORC management meeting. At that meeting, the financial report issued on ORC reflected a $1.7 million loss for January 1983. (R. IX, 948). Morrison stated he never met privately with Bell or related the refineries' worth or CINB's internal evaluation of the loan. Morrison stated that Bell did not ask for the evaluation. (R. IX, 945-50). In the final deal, Morrison described the complex financial exchanges resulting in Bell's acquiring Anderson's profit interest in the Tonkawa refinery and 66% interest in ORC in exchange for Anderson's letter of credit to cover one of An-Son's large receivables in ORC. No cash was exchanged in the transaction. Instead, Bell assumed An-Son's obligation represented by the guaranties. (R. IX, 976).

In the face of this disparate testimony, the jury found CINB did not misrepresent ORC's value or promise continued financing. That is, Bell failed to prove the existence of the overt act of misrepresenting ORC's value. Thus, whether, in fact, the alleged private meeting transpired, this factual underpinning to create a duty to disclose is missing.

On the other hand, to establish the covert act of omitting material information, the half-truth theory, Bell had to prove he sought information, and CINB ventured to offer only part of the information within its exclusive ken. However, we cannot find, except by inference from facts not found by the jury, that Bell made the inquiry in

the first instance. Nor can we work back from the fact of the purchase to supply these elements of proof. The evidence established that Bell was familiar with ORC's financial condition because of his participation on the board. Although CINB had issued loan watch reports and revised its internal evaluation of the asset, CINB has no duty to disclose these internal documents unless the evidence establishes CINB offered only some of them, *Grubb*, or misrepresented their contents. *FDIC v. Palermo*, 815 F.2d 1329, 1336 (10th Cir. 1987.)[11] Because Bell and CINB had no preexisting relationship and "the circumstances of the transaction were not such as to create a relationship of trust and confidence, then the threshold requirement of a duty to disclose has not been met." *Jett v. Sunderman*, 840 F.2d 1487, 1493 (9th Cir. 1988) (duty to disclose does not arise merely because bank is aware of terms of financing instrument in action under Rule 10b-5); *see also Schlifke v. Seafirst Corp.*, 866 F.2d 935 (7th Cir. 1989).

Under Oklahoma law, evidence of each element of fraud must be presented before the issue may be submitted to a jury. *P.E.A.C.E. Corp. v. Oklahoma Natural Gas Co.*, 568 P.2d 1273 (Okla. 1977). A party alleging fraud by

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[11] In *Palermo*, the bank's officer told plaintiff that it held a $130,000 note on property which plaintiff contemplated purchasing. In fact, the bank had previously loaned only $50,000 on the property. "Had [the bank officer] merely represented that he considered the property to be worth $130,000, Palermo's acceptance of this opinion would have been at his own risk. But Palermo testified that [the bank officer] represented that [its morgagee [sic]] actually owed $130,000 on the property. This was a misrepresentation of fact, not an opinion." 815 F.2d at 1336.

misrepresentation or nondisclosure must prove the following elements: (1) a material, false representation or nondisclosure was made; (2) knowledge of the falsity, or recklessly without any knowledge of its truth; (3) the intention that the listener act upon it; (4) the listener's actual reliance; and (5) resulting injury. *Silk v. Phillips Petroleum Co.*, 760 P.2d 174 (Okla. 1988). Moreover, Oklahoma "imposes a high standard of proof on the party alleging fraud." *Federal Deposit Ins. Corp. v. Palermo*, 815 F.2d at 1335.

Without Bell's establishing CINB's duty to disclose, Bell cannot now rely on the alleged misrepresentation to create the foundation for liability. Bell can neither prove the inquiry nor the response. Absent this essential underpinning, the evidence of fraud should not have been submitted to the jury.

This failure of proof is equally fatal to Bell's claims for securities violations. To state a claim under Rule 10b-5, Bell must establish CINB (1) made an untrue statement of material fact or omitted a material fact that rendered the statements made misleading, (2) in connection with a securities transaction, (3) with the intent to mislead, and which (4) caused plaintiff's harm. *Schlifke*, 866 F.2d at 943. Absent the first element, liability does not attach.

We use the same standard as did the district court to decide whether there is evidence to support Bell's claim of fraud by omission. Despite its concern that "there are some legal issues tied up with the duty to disclose," the district court believed the jury properly reached its verdict. Because we believe the proof is all one way or so

overwhelmingly preponderant in favor of the movant that a rational jury could not conclude that CINB had a duty to disclose, *McKinney v. Gannett Co.*, 817 F.2d 659, 663 (10th Cir. 1987), we reverse the denial of CINB's motion for directed verdict and judgment notwithstanding the verdict.[12]

III. Stock Registration

The jury found CINB violated 71 Okla. Stat., § 301[13]. CINB appeals the jury's adverse verdict on this claim, urging the sale met either the non-issuer exemption, 71 Okla. Stat., § 401(b)(1), or the limited offering exemption, 71 Okla. Stat., § 401(b)(9)(A), and, alternatively, the requisite legend stating the stock was not registered appeared on the stock certificate. As an affirmative defense, CINB had the burden of proving the securities in question were exempt from registration. *Wilson v. Al McCord Inc.*, 858 F.2d 1469, 1475 (10th Cir. 1988); *Parrish v. Ben-Jon Oil Co.*, 666 P.2d 1308 (Okla. App. 1983).

Although the evidence was controverted, we are unable to say that CINB established the ANRC securities were exempt from registration under either subsection. The non-issuer exemption is swallowed up by the complex structure of An-Son Corporation which ultimately emerged as the issuer in the transaction. Nor does CINB

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[12] The disposition of the underlying claim necessarily resolves the federal securities issues raised.

[13] 71 Okla. Stat., § 301 states: "it is unlawful for any person to offer or sell any security in this state unless (1) it is registered under this act or (2) the security or transaction is exempted under Section 401."

establish an exemption under § 401(b)(9), any sale by an issuer to not more than twenty-five persons if

> 1. the issuer reasonably believes that all purchasers . . . are purchasing for investment;
>
> 2. no commission is paid or given, directly or indirectly, as consideration for any such solicitation or sale;
>
> 3. no public advertising or solicitation is used in any such solicitation or sale; and
>
> 4. in the event a notification or other form is required to be filed with the Securities and Exchange Commission pursuant to Regulation D under the Securities Act of 1966 in connection with such sale, the notification described in any rule adopted pursuant to division 3 of subparagraph B of this subsection is filed with the Administrator in connection with such sale.

Although An-Son's vice president, James Brown, was asked questions to establish some of these elements, his answers are controverted, and we cannot say with assurance that a reasonable jury could not find CINB failed to establish the affirmative defense. Finally, Oklahoma law is exacting with regard to the requisite non-registration legend. *Parrish v. Ben-Jon Oil Co.*, 666 P.2d at 1310. CINB's principle of integration covering the transfer of the stock certificate and assignment document is not a substitute for the required legend. CINB did not meet its burden of proving the securities transfer was exempt under Oklahoma's registration laws, and the district court did not err in denying CINB's motions for directed verdict and j.n.o.v.

IV. Damages

Because the claims for common law and securities fraud have been eliminated, we remand this case for a new trial on the single issue of the appropriate damages to be awarded on the surviving non-registration claim as governed by 71 Okla. Stat., § 408(a)(2). Under § 408, Bell is entitled to recover the purchase price actually paid for the An-Son securities as well as interest at 10% a year from the date of payment. Costs and reasonable attorney's fees, less the amount of any income received on the security, upon tender of the security, are recoverable. In sum, we REVERSE the denial of CINB's motions for directed verdict and j.n.o.v. on the claims of common law and securities fraud and REMAND the action for a redetermination of damages.

Entered for the Court

John P. Moore
Circuit Judge

APPENDIX 4

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF OKLAHOMA

FEDERAL DEPOSIT INSURANCE CORPORATION,	)	
Plaintiff,	)	Case No. CIV-84-2386-C
v.	)	consolidated with
RAY BELL, ATEX OIL COMPANY, et al.,	)	Case No. CIV-86-1762-C
Defendants.	)	

OPINION
(Filed June 6, 1991)

This matter, originally filed in 1984 and consolidated with a 1986 action, came on for non-jury trial on May 8-10, 1991. The Atex Group and Ray Bell (Atex)[1], defendants in the previous trial but redenominated as plaintiffs for this trial, had prevailed on their counterclaims against Continental Illinois National Bank (Continental).[2] On appeal to the United States Court of Appeals for the Tenth Circuit, appeal case numbers 88-2229 and 88-2274, all but one of the judgments against Continental were

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[1] The term "Atex", as used in this Opinion, refers to the parties Ray Bell and the Atex Group. As used herein, the term "Atex Group" consists of Atex Refining Company, Atex Oil Company of Texas (now known as ATB Realty Company), and Atex Oil Company of New Mexico (now known as ATC Realty Company). Any reference to a specific Atex company is limited to that company only, and not to the other Atex companies. A reference to the Atex Group does not include Ray Bell.

[2] Continental Illinois National Bank is now known as Continental Bank, N.A.

reversed. The Court of Appeals reversed the trial court's denial of Continental's motion for directed verdict on the common law and securities fraud claims, but affirmed the jury's verdict that Continental violated a securities registration provision of Okla. Stat. tit. 71 § 408(a)(2) (1981). The matter was remanded solely for redetermination of damages under § 408(a)(2). Jury trial was waived.

A detailed recitation of the background facts is unnecessary here, but may be found in a companion appeal, *FDIC v. Bell*, 892 F.2d 64 (10th Cir. 1989), *cert. dismissed*, ___ U.S. ___, 110 S. Ct. 2607, and in the Circuit's unpublished opinion, *FDIC v. Bell*, 1990 WL 58108 (10th Cir. 1990). A *brief* recitation of the facts follows.

In 1983, Oklahoma Refining Company (ORC) was owned by two partners, An-Son Refining Company (An-Son) and Atex Refining Company (ARC). An-Son owned approximately two-thirds of ORC, and ARC owned approximately one-third of ORC. Continental and First National Bank and Trust Company of Oklahoma City (First National) provided ORC's credit needs. Continental provided about 80% of the credit, and First National provided the remaining 20%. On April 12, 1983, ORC owed the banks approximately $51.6 million. The ORC partners and their related entities guaranteed, *pro rata*, this debt. On April 12, 1983, Continental played a part in the "sale" of An-Son's two-thirds interest in ORC to Atex. Atex became the 100% owners of ORC. In exchange for the two-thirds interest in ORC, Atex guaranteed all of the

ORC debt, and An-Son and its entities were released from their guarantees.[3]

The sale of An-Son's two-thirds interest in ORC was accomplished by the transfer of 50,000 shares of ORC securities, from which the violation of § 408(a)(2) flows. The measure of damages provided by the statute, as recited by the Court of Appeals, is that Atex is entitled to recover the purchase price *actually* paid for the An-Son securities, plus interest at 10% per year from April 12, 1983, costs and attorneys' fees, less any income received on the securities.[4] The Court is, at this time, concerned only with the purchase price and income elements.

Measurement of Damages

The parties disagree on the method to value the guarantees. After reviewing the parties' trial briefs and relevant case law, the Court, on May 6, 1991, during the pre trial conference, held that the consideration given for the An-Son securities would be valued as the amount of

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[3] The transfer of the securities was accomplished by means of a Reorganization Agreement. Appendix "A" to the Reorganization Agreement is an Assumption Agreement, which accomplished the assumption of An-Son's debt by Atex.

[4] 71 Okla. Stat. § 408(a)(2)(i) actually provides:

> [T]he person buying the security . . . may sue either at law or in equity to recover the consideration paid for the security, together with interest . . .

The Circuit added the term "actually" in front of the word "paid," the significance of which has not been addressed by the parties. This Court concludes that the added term is of no consequence to the determination of the values necessary to resolve this dispute.

new debt undertaken by Atex, but reduced by the value of the collateral securing the guarantees, both values to be determined as of April 12, 1983, the date of the securities transfer. Atex objected to this measurement standard, and the Court granted a standing objection. Evidence at trial was then limited to that relating to the amount of debt undertaken by Atex, the value of the collateral securing the debt, and any income received on the securities.

Atex argued in its trial brief that the value of the consideration given for the securities equaled the amount of the new obligations it undertook on April 12, 1983. Plaintiffs' Trial Brief at 8. Atex also argued that the value of consideration should not be reduced by the value of collateral securing the guarantees. Plaintiffs' Trial Brief at 12. As stated above, the Court agrees with the former contention but disagrees with the latter. Atex's argument that the value of the guarantees should not be reduced by the value of the collateral is premised on the guarantee's provisions allowing the banks to proceed directly against the guarantors without first proceeding against or exhausting any collateral. *Id.* Atex argues that under the terms of the Agreement (effecting the sale of An-Son's interest to Bell and Atex), the guarantors were not entitled either to rely upon the collateral or to a reduction in their obligations upon sale of the collateral. *Id.*

However, the Agreement *does* allow Atex to eventually use the collateral. Even though Atex was required to first satisfy their full obligation of the ORC debt, once that occurred, Atex had full rights in the collateral.

Section 408 permits the Court to fashion an equitable remedy. It is not equitable to value the guarantees at the face amount of the new debt undertaken while ignoring the value of the collateral. It is axiomatic that the maximum financial risk to a debt guarantor is the amount of the debt guaranteed minus the value of collateral securing the debt. Thus the most equitable value of the guarantees in this case is the amount of new debt undertaken, less the value of the collateral used to secure the debt.

Continental argues in its trial brief that a guarantee is a contingent liability, not a direct liability, and that its value should not be measured by the amount of the debt guaranteed. Using the analysis provided by Judge Posner in *In Re Xonics Photochemical Inc.*, 841 F.2d 198 (7th Cir. 1979), Continental argues that the value of a contingent guarantee must be considered in relation to the *probability* of it being called and in relation to the net worth of the obligors. Because Continental argues that there was a very slight chance, if any at all, that the guarantee would be called, and that the net worth of the guarantors was not sufficient to truly guarantee the debt, the guarantee's value is zero. This argument would be very appealing were it not for the fact that the guarantees were given *in exchange for* An-Son securities, and for the fact that the *FDIC paid Continental* approximately $41.6 million to

acquire the guarantees.[5] Thus, at least equitably, there is positive value for the guarantees.

The Court is unable to find case law where the precise question presented here was before the court. The *Xonics* analysis has been used by other courts primarily in situations involving bankruptcies and preferential transfers. This circuit has not used the *Xonics* analysis in determining the values of assets or in questions of insolvency. In questions addressing whether a debtor was insolvent at the time a certain transaction was conducted, the guarantor's net worth and the guarantee's "call probability" appear relevant. But determining the probability that a guarantee would be called is extremely speculative. In this case, Atex argued the chances were virtually 100%, as evidenced by the fact that the guarantees eventually were called, but Continental argues that the chances were very low. The probability analysis is simply too speculative for use in this case.

The situation here does not present us with questions of insolvency or preferences. This Court is trying to determine the value of consideration given, traded in a bargained for exchange, between a willing buyer and seller. Thus, the measure of damages, determined in light of the Court's goal of achieving equity, and considering those factors discussed above, is the amount of new debt

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[5] Continental also argues that because no cash changed hands, in that Bell merely signed the guarantees and did not pay any cash for An-Son's share of the ORC securities, that the value of the consideration given is zero. This argument is without merit. Consideration need not be in cash, but maybe in a variety of other forms.

undertaken, reduced by the amount of collateral securing the debt, without regard to the net worth of the guarantors or the probability the guarantees would be called.

Tender of Securities

At trial, Continental moved for judgment on the grounds that the securities had not been tendered to it before trial, as the statute requires. The motion was taken under advisement and is now denied. The Court finds that Continental's motion was not brought in a timely manner, in that it should have been raised at the first trial.[6] The instant trial is only for determination of the amount of damages. Liability was established in the first trial, and affirmed on appeal. The Court DENIES Continental's motion for judgment.

Issues

There remained these issues to be determined at trial: (1) the amount of new debt undertaken by Bell and Atex in exchange for the ORC securities; (2) the value of the collateral used to secure the obligations; and (3) the amount of income, if any, received on the securities.

A. Obligations Undertaken

The parties stipulated that at the time of the sale of the ORC securities, the term and revolving debt owed by

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[6] If the motion for judgment was made at the first trial, then the trial court's ruling on it and the Circuit's affirmance of judgment against defendants on the § 408 claim makes the trial court's ruling *res judicata*.

ORC was $42,750,999.00. ORC's "callable letters of credit" debt totaled $8,887,266.00. Thus, the total stipulated bank debt was $51,638,265.00.

In its closing statement,[7] Atex argues for the very first time that it also assumed $25,236,188.00 in non-bank payables. Atex's trial brief never discussed the non-bank debt, and the amount of non-bank debt never figured into Atex's earlier damage calculations. An earlier motion for summary judgment presented by Atex never mentioned the non-bank debt nor did it use the non-bank debt in the damage formulas. This assertion did not appear in any motion in limine, and moreover, it never appeared in any expert's trial affidavit. The first time the Court or Continental had notice that Atex would attempt to use the non-bank debt in its damage theory was when Atex attempted to elicit evidence of the non-bank debt during trial from Mr. D.R. Harris (Continental's expert witness) and Mr. Kevin Watley. Mr. Watley's testimony in this regard met with an objection from Continental, which was sustained by the Court. In sum, other than some testimony concerning the amount of the non-bank debt, there was no testimony allowed indicating that it was an element of the consideration given for the securities.

Atex now asserts that because the Assumption Agreement provides that Atex will assume *all* debts of ORC, the non-bank debt *must* be included. In Continental's proposed findings of fact and conclusions of law, it

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[7] At the close of evidence, the Court ordered that closing arguments should be submitted to the court, in writing, within one week accompanied with proposed findings of fact and conclusions of law.

first argues that the inclusion of the non-bank debt in Atex's damage formulas violates the Court's scheduling orders for the reasons set forth in the preceding paragraph. It also argues that the Assumption Agreement actually in effect between the parties provided only that Atex and Bell relieve Anderson and An-Son from their *personal* obligations and guarantees relating to ORC. Pursuant to this Assumption Agreement, liability for ORC's debt was not assumed from ORC, but from Anderson and An-Son. Therefore, the non-bank debt was not part of the debt assumed pursuant to the Assumption Agreement. Continental asserts that the record contains no proof that An-Son or Anderson were personally liable for any non-bank debt. Indeed, An-Son and Anderson had no personal liability for ORC's debts other than the bank debt they guaranteed. The guarantees are the ones assumed by Atex pursuant to the Assumption Agreement, and which are the guarantees that have been the sole topic of Atex's arguments prior to trial. *See* Continental's Proposed Findings, p. 15, n. 2.

When Continental realized Atex's approach, it introduced, over Atex's objection, its Exhibit 94, which purports to be the complete Reorganization Agreement and Assumption Agreement between the parties. Atex's objection asserted that Continental previously stipulated to the authenticity of Defendants' Exhibit 12, a copy of the Reorganization Agreement and an Assumption Agreement. But Continental argues that it stipulated to the authenticity of the Reorganization Agreement, which is identical in both Exhibits 12 and 94. However, the Assumption Agreements are different. Exhibit 12 contains an Assumption Agreement never executed, while Exhibit

94 contains the Agreement which was executed. Exhibit 94's Assumption Agreement sets forth the assumption of personal debt from An-Son and Carl Anderson, not from ORC.

Throughout these proceedings, Atex has argued for an equitable remedy. The Court finds it difficult to achieve equity while ignoring Continental's argument. Atex's arguments that the non-bank debt must be included in the value of the new debt undertaken must be rejected for two independent reasons: (1) the argument that it should be included was never raised prior to trial, and its use now would violate the Court's scheduling orders; and (2) Defendants' Exhibit 94 indicates that the non-bank debt was not part of the debt undertaken by Atex when it assumed An-Son's and Anderson's obligations.

The total debt of ORC assumed by Atex on April 12, 1983, is therefore found to be the amount of bank debt and callable letters of credit, stipulated to be $51,638,265.00.

New Debt Undertaken

Prior to the transaction on April 12, 1983, Atex Oil Company (Texas) did not guarantee, and was not obligated for, any portion of the ORC debt. Thus the "new debt undertaken" by Atex Oil Company (Texas) is $51,638,265.00. Atex Refining Company did not guarantee any of the bank debt prior to April 12, 1983. Under the terms of the Assumption Agreement, when Atex Refining Company guaranteed the bank debt, 100% of the bank

debt was "new debt undertaken." Therefore, Atex Refining Company's new debt is $51,638,265.00. Atex Oil Company (New Mexico) and Ray Bell, prior to the April 12 transaction, already guaranteed 34% of ORC's bank obligations. Thus, the "new debt undertaken" by Bell and Atex Oil Company (New Mexico) is 66% of the $51,638,265.00 bank debt, or $34,081,255.00.

B. Collateral Value[8]

1. ORC's non-refinery assets.

(a) Cash. The parties agree that ORC's cash on hand was $8,061,514.00.

(b) Accounts receivable. Atex argues that ORC's accounts receivable should be valued at $14,182,369.00, a figure $250,100.00 less than the $14,432,469.00 figure asserted by Continental.[9] Continental's figure is based on the total book amount of the accounts, with the assumption that they are 100% collectable. Atex disputes that the accounts are 100% collectable, pointing out that ORC experienced a 1/2 of one-percent loss factor while operational. But .005% of $14,432,469.00 is only $72,162.34. The $250,000.00 discount comes from Mr. Watley's testimony

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[8] Unless stated otherwise, all values are as of April 12, 1983, or the closest day thereto as is available for valuation.

[9] Kevin Watley valued the accounts at $14,182,469, an amount $250,000 less than the amount asserted by Continental. The figure used in Atex's closing argument appears to include a $100 error, which the Court disregards. The Court will use Mr. Watley's figure in this analysis.

wherein he stated that, after consultation with Tom Sutton[10], he took into consideration what he thought were uncollectible accounts, and reduced the value of the accounts receivable by $250,000.00. This represents a reduction of approximately 1.7%. The Court finds that 1.7% is a fair reduction when one considers uncollectible accounts and costs of collection. Therefore, the accounts receivable shall be valued, for purposes of determining the collateral value of ORC, at $14,182,469.00.

(c) Crude oil. The undisputed value of the crude oil held by ORC is $3,099,953.00. Mr. Harris, Continental's expert, estimated this value without consideration to liquidation costs or discount. Atex argues that even without considering such expenses or discounts, $750,000.00 of the crude oil was unrecoverable sludge in ORC's tanks, and could not have been sold. Mr. Harris testified that Mr. Sutton told him about the $750,000.00 in sludge, but that he took this fact into consideration when he used the "lowest values in every possible instance." Tr. at 49.

The Court is not at all certain that Mr. Harris's estimate properly accounts for the unrecoverable sludge, and therefore finds that Mr. Harris's estimate of the crude oil's value should be reduced by $750,000.00. Accordingly, the Court finds that the value of the crude oil should be set at $2,349,953.00.

(d) Oil in process. Both parties agree that Mr. Harris's valuation of the oil in process is correct. Mr. Harris set the value at $3,860,636.00. However, Atex

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[10] Mr. Sutton, an employee of ORC since sometime before July 31, 1983, became controller of ORC on July 31, 1983.

argues that if ORC was shut down at the time of sale, as Mr. Harris has assumed while performing his calculations, 10% of the value of the oil in process would be lost from evaporation alone. Again, Mr. Harris's testimony indicates that although he may have been informed of the evaporative loss, his figures do not expressly reflect a deduction for the loss, or a reason for rejecting the evaporated amount.

There was no testimony presented disputing the evaporative loss argument. Accordingly, the value of the oil in process should be reduced by the 10% evaporative loss factor, resulting in a value of $3,474,572.40.

(e) Gasoline and refined products. The parties agree that the value of the gasoline and refined products should be set at $12,392,351.00.

(f) Letter of credit. Cherokee Services used a letter of credit to guarantee an ORC account receivable. Mr. Harris valued the letter of credit at its face amount, $1,303,438.00. Atex argues, and Mr. Watley testified, that the letter of credit backed up an account receivable which Mr. Harris already included in his valuation of the accounts. Tr. at 297. Continental presents no evidence to the contrary, only arguing in its closing statement that the letter of credit was valid and should be valued on its face.

To use the letter of credit as an additional element of ORC's non-refinery assets would be counting its value twice. Its value has already been considered in the accounts receivable. Accordingly, ORC's assets should not be increased by the value of this letter of credit.

(g) Promissory note. Ray Bell Stations, Inc., executed a promissory note on April 12, 1983, in the principle amount of $1,500,000.00, payable to ORC. Atex argues that the note should have no value in the calculation of ORC's assets because no principle was payable for two years following its execution, and once principle payments were to begin, the note was to be paid out over five years. Atex also points out that the note was deemed uncollectible by ORC's bankruptcy trustee, and efforts to collect it were abandoned.

Atex's arguments consider the note's value in light of facts which became known well after April 12, 1983. The Court is determining values as of April 12, 1983, the very day this note was made. The value of the note, on the day it was made, is clearly $1,500,000.00.

But Atex also argues that the validity of the note has been disputed ever since its execution, as it was executed in error. Continental points out that ORC listed the note as an asset worth $1,500,000.00 on ORC's April 14, 1983, Collateral Base Certificate. The Court agrees with Continental, that on April 12, 1983, all parties considered the value of the note to be $1,500,000.00.

The evidence therefore establishes that on April 12, 1983, the value of the Ray Bell Stations, Inc., promissory note was $1,500,000.00, and that this amount should be included when determining the value of ORC.

Total Non-Refinery Assets:

The sum of the non-refinery assets equals $41,960,859.40. This figure must be added to the value of

the two refineries to determine the total value of ORC collateral securing the bank debt.

2. Refinery Assets.

The Cyril and Thomas refineries were valued together. Expert testimony as to their value was presented by both parties.

(a) David Capers, Atex's expert. Atex called David Capers to estimate the value of the refineries on April 12, 1983. Mr. Capers gave two different opinions of the value of the refineries, achieved using different valuation methods. Using a "going business concern" method, Mr. Capers valued the refineries at $7,000,000.00 to $12,000,000.00. Tr. 214. Using alternate methods, valuing the refineries at their liquidation value, and at their cash-flow value, he determined the refineries were worthless. Tr. 230, 245-46.

Mr. Capers' testimony as to the refineries' business concern value is much more persuasive than the estimate of no value. The Court accepts the going business concern value method because it relates to the value of the refineries as of April 12, 1983, a point in time when the refineries were in fact operating. Certainly, Atex would not have purchased the refineries for liquidation purposes, but instead purchased them to continue their operation.

Mr. Capers testified that some environmental concerns would reduce the value of the refineries. However, on the date of the transaction, such conditions were

unknown to the parties.[11] Thus, their effect on the valuations is rejected.

Mr. Capers testified on cross-examination that he used, for comparison purposes, the sale of four other refineries in calculating his figures. Only one of the four sold refineries Mr. Capers considered was a cracking refinery, although ORC's Cyril refinery had cracking capability. He further testified that he did not use the sale of two cracking refineries, Sinclair and Diamond-Shamrock, in his analysis. Tr. 243. He would not agree or disagree that if he had seen the figures for the Diamond-Shamrock and Sinclair refinery sales that his valuation would have gone up.

Mr. Capers also testified that by using a third method of valuation, a cash-flow valuation, these refineries were worth nothing. The Court does not find this valuation method credible. Mr. Capers' entire cash-flow estimate was made using data from a single quarter. The quarter Mr. Capers used was shown on cross-examination to be the quarter when all refineries in the United States experience their lowest returns. Tr. 265.

Thus Mr. Capers' most credible estimate of the value of the refineries is his going-concern value of seven to twelve million dollars. The Court finds that the value of the refineries should be at near the top, if not over, this range, considering that Mr. Capers' study did not account for recent sales of cracking refineries. The testimony of

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[11] The environmental problems were not made known until approximately November, 1983, several months after this transaction.

Continental's expert helps paint a better picture of the refineries' value.

(b) William Grattendick, Continental's expert. Continental called Mr. Grattendick as an expert to place a value on the refineries. On a comparable sales method he conservatively valued the refineries at $14,500,000.00. On a discounted cash flow method he valued the refineries at $24,600,000.00. Although Mr. Grattendick testified that buyers and sellers usually use the discounted cash flow method to value properties, he felt comfortable relying on the comparable sales method.

Atex attacks Mr. Grattendick's comparable sales estimate as being merely a subjective estimate, prone to change over time. The record is clear, however, that much research and analysis went into Mr. Grattendick's opinion, making it more than a "forensic dart" throw as Atex describes the estimate. The Court has considered Atex's closing argument criticism of Mr. Grattendick's opinions, but is not so persuaded by the arguments so as to disregard Mr. Grattendick's opinions.

The Court is challenged to find a value for the refineries by choosing one of the two experts' opinions. Each party aptly demonstrated flaws in the opposing expert's analysis. But both experts were well qualified. Both experts relied on objective data in arriving at their estimates. The Court finds Mr. Grattendick's testimony better grounded in objective and complete data than Mr. Capers'. Mr. Capers' estimate was flawed, the Court finds, by using the one fiscal quarter when all refineries experience hard times. He admitted that his value might have risen, given other data.

The testimony of these two experts comes closest to agreement in their high and low ranges, respectively. The "window" of agreement is that the refineries could have been worth $12,000,000.00 to $14,500,000.00 on April 12, 1983. Because Mr. Capers did not deny the possibility that his estimate would have increased had he considered the Sinclair and Diamond-Shamrock sales, the Court finds that a fair, equitable, and factually supported value for the refineries would be higher than his highest estimate. Mr. Grattendick's value of $14,500,000.00 was not a range, but a set value based on comparable sales, and the Court finds it a fair, equitable, and factually supported figure.

Continental argues that Atex should be bound by Ray Bell's statements and his counsel's argument at the first trial which imply a value to the refineries. It argues that because the testimony and argument was that if the refineries had been liquidated on April 12, 1983, the bank debt would have been paid off in full, Atex is estopped from asserting that the value of the refineries was less than the amount of the bank debt. The Court is not persuaded, however, that the statements in the first trial are valid and sufficient evidence of the value of the refineries. The Court instead relies on the testimony of the experts as presented at this trial, supported by objective proof. Accordingly, the Court finds that the value of the two refineries on April 12, 1983, was $14,500,000.00.

Total ORC Assets:

The total value of all assets of ORC as of April 12, 1983, is found to be $56,460,859.40. The total assets exceed the value of the new debt undertaken by any of

the three plaintiffs. The Court therefore finds that there was no value to the consideration given for the ORC securities. It will be the judgment of this Court that plaintiffs Atex Refining Company, Atex Oil Company (Texas), Atex Oil Company (New Mexico), and Ray Bell take nothing from defendant Continental Bank, N.A.

Continental argues that because the value of the assets securing the debt exceed the value of the new debt undertaken, the Court need not reach the question of whether there was income on the securities. However, in light of the probability of an appeal, and considering that the evidence relating to income on securities has been presented to the Court, the following findings and conclusions are entered so that in the event further consideration of this matter becomes necessary, the evidence will not have to be submitted anew.

3. Income Received on the Securities.

Continental argues that Atex received income on the securities in three different ways. Atex argues that no income was received from the three "transactions" because income on securities is defined as a benefit flowing from the consequence of ownership of the securities, without the intervention of an independent transaction by the possessor. Atex cites *Randall v. Loftsgaarden,* 478 U.S. 647, 658, (1986) for this proposition. The definition of income on securities as mentioned in *Loftsgaarden* is somewhat confusing. Reference to the Restatement of Restitution, cited by *Loftsgaarden,* sheds no light on the problem of interpreting this definition. The problem is that the term "independent transaction" is not adequately

defined. However, the Court believes that this problem is relevant to only one of the three purported income transactions.

(a) Gasoline purchases by Bell from ORC. Continental argues that the gasoline received by Bell from ORC, and not paid for, was income on securities. Atex argues that it is not, because it is not a benefit that meets the *Loftsgaarden* test. The Court finds, however, that the gasoline is an in-kind dividend, and thus an income on security. Bell would have had no right to take the gasoline without payment unless he and his companies were the 100% owners of ORC. The amount due for the gasoline is not reflected on ORC's March – April, 1983, financial statements because the gasoline was taken after the sale of ORC to Atex.

Continental argues that the "dual control" exercised by Bell, being both the buyer and seller of gasoline from ORC, makes the *Loftsgaarden* analysis inapplicable. The Court agrees. An example in Continental's closing argument illustrates this point: If Ray Bell were to open ORC's cash register and pocket money, he would certainly not be allowed to claim that his action was an independent transaction and therefore the direct benefit rule would not classify the cash taken as income received. Such a result is absurd, defies logic, and in this instance, is inequitable as well. The taking of the gasoline is a like transaction.

Atex's trial exhibit number 18 reflects that $3,766,297.08 was owed by Bell's companies to ORC. This amount was for gasoline taken, but for which payment was never made. Defendant's exhibit 52; Tr. 100, 117.

Continental alleges the true figure to be $4,142,136.08. The Court agrees. $375,839.00 had been advanced to ORC for payroll expenses and gross production taxes. The $3,766,297.08 figure was set *after* considering these advances and providing credit for them. Defendants' exhibit 53; Tr. 116. Thereafter, Gary Morrissey, ORC's trustee, settled a different debt owed to ORC by Bell and certain Atex companies, taking into consideration the same advances and again giving credit for them. Defendants' exhibits 53 and 86; Tr. 100-04, 115-20. Therefore, Bell and Atex received credit for the advances twice. Adding the credit amount to the amount owed for gasoline verifies Continental's figure of $4,142,136.08.

Kevin Watley testified that a dividend could be made in kind rather than in cash. Tr. 336-40. He also testified that a constructive dividend can be made without being declared, and that the gasoline taken by Bell could be construed to be a constructive dividend. *Id.* The Court finds this argument persuasive, as well as equitable, and therefore finds that Atex received income on the securities, from the gasoline taken from ORC without payment, in the amount of $4,142,136.08.

(b) Ray Bell Stations, Inc. Promissory Note. Continental alleges the $1,500,000.00 note executed by Ray Bell Stations should be considered income on the securities. However, the Court has already determined that the note should be considered as part of the assets of ORC. To hold that the note is also income would provide a double credit, akin to the double credit Continental complained of in relation to the gasoline credits. Therefore, the Court declines to find that the note is income on the securities.

(c) Preferential Discounts. Continental also argues that Atex received preferential discounts on the gasoline it purchased from ORC. Mr. Wilsey testified that the value of the discounts given to Atex totalled $121,878.00. The Court cannot conclude, on this testimony, that preferential discounts amount to income on securities. Merchants commonly provide discounts to their volume customers. Without other evidence that these discounts were of proportions indicating something other than routine discounts, the Court will not find them to be income. Therefore, the Court declines to find the discounts were income on the securities.

Total Income on Securities

The Court finds that income on securities totals $4,142,136.08.

Continental argues that a provision should be made for interest on any income the Court finds was received by the securities. There being no express provision in § 408 for interest on the income received, the Court declines to apply such a provision.

CONCLUSION

For the reasons set forth above, the Court finds that ORC's total bank debt on April 12, 1983, was $51,638,265.00; that the total new debt assumed by plaintiffs pursuant to the Reorganization Agreement did not exceed $51,638,265.00; that the value of the assets securing the bank debt was $56,460,859.40; that the income received on the securities was $4,142,136.08; and that

because the value of the collateral securing the debt exceeded the value of the new debt undertaken by plaintiffs, there was no valuable consideration actually paid by plaintiffs for the securities.

Okla. Stat. tit. 71 § 408 provides that prevailing plaintiffs may recover their attorneys' fees. Atex already has been determined to be the prevailing party in this action, notwithstanding the determinations herein. The parties are directed to file any submissions concerning attorneys' fees by June 21, 1991. Such briefs shall not exceed twenty-five pages in length, and each party may file a response fifteen days thereafter. A judgment shall enter following resolution of all remaining matters.

IT IS SO ORDERED THIS 6 DAY OF JUNE, 1991.

/s/ Robin J. Cauthron
ROBIN J. CAUTHRON
UNITED STATES DISTRICT JUDGE

APPENDIX 5

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CONTINENTAL BANK, N.A., formerly known as Continental Illinois National Bank and Trust Company of Chicago,	)	
Plaintiff - Appellee, Cross-Appellant,	)	
and	)	Nos.
FEDERAL DEPOSIT INSURANCE CORPORATION, Receiver, Substituted for First National Bank & Trust Company of Oklahoma City, Oklahoma,	)	91-6260 and 91-6278
Plaintiff,	)	
v.	)	
JAMES E. BURKE, Trustee for Atex Oil Company of Texas, now known as ATB Realty Company, and Atex Oil Company of New Mexico, now known as ATC Realty Company; ATEX REFINING COMPANY; and RAY BELL,	)	
Defendants - Appellants, Cross-Appellees,	)	
and	)	
ATEX OIL COMPANY, ATEX STATIONS, INC., ANSON REFINING CO.: ATEX PIPELINE CO., ANSON PIPELINE CO., OKLAHOMA PIPELINE CO., and ANDERSON-PRICHARD PIPELINE CORPORATION,	)	
Defendants.	)	

ORDER
Entered October 15, 1993

Before McKay, Chief Judge, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, and KELLY, Circuit Judges.

This matter comes on for consideration of The Atex Group and Ray Bell's petition for rehearing and suggestion for rehearing in banc.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the suggestion for rehearing in banc was transmitted to all of the judges of the court who are in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

/s/ Patrick Fisher
By Patrick Fisher
Chief Deputy Clerk

APPENDIX 6

Lender Liability
Law Report

Vol. 4, No. 1/July 1990

Edited by Helen Davis Chaltman, Esq.

Tenth Circuit Reverses $52 Million Jury Verdict and Holds Bank Had No Duty to Disclose Information

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The Tenth Circuit has reversed a $52 million jury verdict in favor of a guarantor, holding that the issue of the lender's fraud should never have been submitted to a jury. In spite of the jury's specific finding that the lender had engaged in deceitful conduct by failing to disclose material information, the court held that the proof at trial was so one-sided that "a rational jury" could not conclude that the lender had a duty to disclose information. (*Federal Deposit Ins. Corp. v. Bell,* 1990 WESTLAW 58108 (10th Cir. April 24, 1990).)

NOTICE: Tenth Circuit Rule 36.3 states that unpublished opinions and orders and judgments have no precedential value and shall not be cited except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel.

Underlying Facts. Ray Bell owned certain companies which operated gas stations. He was a part owner of two Oklahoma oil refineries and, in 1983, he decided to acquire the two refineries in full to assure a supply of gas for his stations. Bell did not pay cash for the refineries, but he agreed to personally guarantee the loans to the refineries from Continental Illinois National Bank. The

loans were restructured and the bank financed the refineries until sometime in 1984 when the refineries filed in bankruptcy, having been hard hit by the recession in the oil business.

At the time of the purchase, Continental had reduced its own estimate of the value of the refineries from $35.2 million to $22.3 million and had placed the loan under close supervision. This was not disclosed to Bell.

As part of the FDIC bailout of Continental, the FDIC acquired Bell's guaranties and sued to recover the refineries' debt. The FDIC recovered a judgment of $52 million against Bell.

Bell's Counterclaims. Bell had asserted counterclaims against the FDIC and Continental, claiming that the bank had obtained his guaranties by fraudulently concealing its knowledge about the refineries in order to benefit the seller, a long time customer of the bank.

The Tenth Circuit had held, in *FDIC v. Bell* (892 F.2d 64 (10th Cir. 1989)), that Bell's fraud counterclaims against the FDIC were barred by 12 U.S.C. Section 1823(e), but Bell went to trial in Oklahoma on his common-law claims against the bank.

The jury awarded Bell $52 million – the same amount as the FDIC's judgment. The jury had found, in answers to special interrogatories, that the bank had fraudulently failed to disclose material facts concerning the value of the refineries to Bell, although the jury did not respond to an interrogatory asking whether the bank had affirmatively misrepresented the value of the refineries to Bell.

Tenth Circuit Decision. On appeal, the bank argued that it could not be liable to Bell because it had no duty to disclose its own valuation of the refineries or the fact that the loan was under close scrutiny within the bank. The Tenth Circuit agreed, holding that there is nothing in the common law of fraud or in the federal securities laws which "suggests an affirmative duty to disclose all material information absent [this] foundational nexus" of a fiduciary relationship or the "offering of some information after inquiry is made."

The court cited its decisions in *MSA Tubular Prods., Inc. v. First Bank and Trust Co.* (869 F.2d 1422 (10th Cir. 1989)) and *Grubb v. FDIC* (868 F.2d 1151 (10th Cir. 1989)) for the proposition that the duty of full disclosure is imposed on parties that choose to volunteer information in response to an inquiry. When an inquiry is made, the court held, the party is obligated either to remain silent or to disclose all material facts.

Bell had testified at trial that a bank officer had told him the refineries were worth $47 million, but the jury had apparently rejected this testimony because they did not answer the interrogatory concerning the affirmative misrepresentation. Hence, the court found no factual underpinning for imposing a duty of full disclosure on the bank.

LLLR OBSERVATIONS: The FDIC and Continental took a different view of the common-law obligation to disclose material information in *FDIC v. W.R. Grace & Co.* (877 F.2d 614 (7th Cir. 1989)). There the Seventh Circuit affirmed on liability, but remanded on damages, a $50 million judgment in favor of the FDIC, as successor in

interest to Continental, against W.R. Grace for failure to disclose material information concerning the value of collateral pledged to the bank. (See "$50 Million FDIC Judgment Against W.R. Grace Affirmed on Liability, Remanded on Damages," *LLLR* Sept. 1989, at 1.)

In that case, the Seventh Circuit suggested that since Grace had come upon information "without substantial investment" which Continental would find very costly to discover itself, Grace had an obligation to disclose that information to Continental. The court was aware that Continental's own energy experts had assumed the very information which was not disclosed. Nevertheless, they affirmed the judgment as to liability.

One could easily extend the Tenth Circuit's holding in the Bell case to require Continental to disclose to Bell its own valuation of the refineries and the fact that it had classified its loan, since this was information which Continental had already obtained and which Bell could not otherwise obtain.

In may be that the only rule to draw from these two, somewhat inconsistent decisions is that in these troubled times for financial institutions, the FDIC and the troubled institution will be favored by the courts.

APPENDIX 7

* * *

[p. 203] And we went into the office of the president, Derek and myself. We sat down on the couch and then again, Derek was – or Derek at that time was talking to me about buying the refinery. And he told me that they'd had an engineering, a fairly recent engineering report. Told me the value of the refineries, told me that it would be advantageous for us to acquire it. He said that they liked our on-hands approach, the way we had operated Tonkawa. He liked the way that we did business and he would like to see us work out something to acquire Mr. Anderson's interest.

Q And this was a meeting between you and Mr. Morrison, Derek Morrison?

A Yes, sir.

Q Before the manager's meeting began?

A Yes, sir.

Q And you and he were by yourselves?

A That's my recollection. There might have been – I think there was someone else in the room but I believe Derek wanted to talk to me alone. So –

Q And what did – what was the discussion concerning the engineering department of the Continental Bank?

A He told me that the engineers had evaluated the Cyril Refinery at 32 million dollars and then he also told me that they felt that the value of the Thomas plant was 15 million, total of 47 million.

[p. 204] Q Now, was the market value of the two of them together?

A Yes, sir.

Q Would be a 32 million for Cyril and 15 million for Thomas?

A Yes, sir.

Q And at that time do you remember approximately what the debt on that refinery or those refineries and ORC was, the capital debt?

A My recollection was that it was about 27 million, I think. I believe that was right, or maybe – that's my recollection of the total indebtedness, maybe, with adjustments, would be 27 million. Or that might have been how much additional debt that would be. I can't be sure on that. But, anyway, what he said was that I would be getting – for the two-thirds, I would be getting a net value of 10 million dollars in net worth.

Q In other words, am I correct in understanding your response, Mr. Bell, that Mr. Morrison told you that if you bought the Anderson two-third interest of the ORC refinery, already owning a third, that you would get a 10 million dollar equity benefit? If that's not correct, please restate it.

A Yes, sir, increase, yes, sir.

MR. MEYERS: Objection, Your Honor. Counsel is

* * *

[p. 229] please, sir.

A All right. When Continental told us that they would not issue new letters of credit, I said, "All right, give us our collateral back, our stations." They said, "Oh, no, we've cross-collateralized that and that's good for the other loan."

And Atex Oil Company had loaned ORC the bank stock and had loaned the real estate for collateral for the letters of credit. Therefore, the Atex people decided that they should get an offset. So they started purchasing gasoline or they were purchasing gasoline, so they stopped paying for the gasoline and hoping that they would get the value of the collateral back. But, of course, a bankruptcy – when bankruptcy was filed, well, that permitted – stopped that.

But, of course, they nowhere near got the value back. But, see, Atex Oil Company owned the bank stock. Atex Oil Company of Texas owned the service stations, so they got a certain amount of gasoline and they're claiming that as an offset.

Q Mr. Bell, were you ever told that the Continental Bank evaluated the ORC refineries prior to the sale to you, I believe, in April of 1983 that they had internally, their engineering department had evaluated the refineries having a market value of 22.3 million dollars? Were you ever told [p. 230] that?

A No, sir.

Q Which, in effect, if ORC at that time had a capital debt of 32 million dollars would have made ORC insolvent? Were you ever told any of this?

A No, sir.

Q Were you told, were you ever told, that Continental had an internal engineering report evaluating the refineries at 22.3 million dollars prior to your purchase of the An-Son two-thirds?

A No, sir, it was 45 million.

Q I think you testified 47, but I'm not arguing with you.

A Yes, sir.

Q It was 32 and 15 or something.

A All right. Sorry.

Q Mr. Bell, if you had that information, would you ever have recommended to your associates and would you ever have purchased An-Son's two-thirds?

A No, sir.

Q Number two, have you ever been informed by anybody at Continental prior to your purchase in April of '83 of the An-Son two-thirds of ORC, that the ORC loans to ORC in favor of Continental had been classified by the Continental Bank as substandard, poor, and doubtful?

[p. 231] A No, sir, I would have been very much surprised because I thought they were performing loans.

Q If you had known prior to this purchase in April of '83 that the bank, the Continental Bank, had downgraded the ORC credit to poor or doubtful recovery, would you have ever purchased –

A No, sir.

Q – the An-Son two-thirds of ORC?

A No, sir.

Q Were you ever told by any of the bankers at Continental that the ORC, the Oklahoma Refining Company, revolving line of credit had to a large degree ceased to revolve since Carl Anderson had used this short term credit to install fixed assets leaving ORC at least 11 million dollars undercapitalized?

A No, sir.

Q Would you have purchased An-Son's two-thirds of ORC had you been informed of that?

A No, sir.

Q Were you ever informed by anybody at Continental that the ORC term debt of 14 millions of dollars could not be repaid by ORC from its operations?

A No, sir.

Q Would you have purchased the An-Son two-thirds of ORC had you known that?

* * *